

Risky identities and suspect communities

How pre-emptive counterterrorism surveillance in Norway is
challenging the right to non-discrimination

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Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CERD	Committee on the Elimination of Racial Discrimination
CoE	Council of Europe
ECJ	European Court of Justice
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EOS Committee	Norwegian Parliamentary Intelligence Oversight Committee
EU	European Union
EU Framework Decision	European Council Framework Decision on Combating Terrorism
Financing Convention	International Convention for the Suppression of the Financing of Terrorism
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
Resolution 1373	United Nations Security Council Resolution on Threats to International Peace and Security Caused by Terrorism
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

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1 Introduction

In April 2013 the *Norwegian Parliamentary Intelligence Oversight Committee* (hereinafter, the EOS Committee) submitted a special report to the Parliament concerning the Police Security Service's surveillance of two Muslim communities in Norway. The report disclosed that over a ten-year period, the Police Security Service had collected and treated information about numerous individuals' religious beliefs, in a manner that was deemed incompatible with the rules pertaining to the information gathering of the Service.

The discourse on counterterrorism surveillance in the 21st Century is often described as all-embracing and indiscriminate, premised on the notion that everyone will have to forsake a degree of individual rights protection in order to realize the State's national security objectives. However, a concealed aspect of this intangible balance metaphor is the distributive implications that pre-emptive surveillance generates, where certain individuals and groups in society arguably become more exposed to carrying the burden of counterterrorism objectives.

The aim of this thesis is to substantiate the hypothesis that the application of pre-emptive surveillance measures for counterterrorism purposes are premised on a prediction of future national security threats that uses ethnicity and religion as proxies for risk in order to identify possible perpetrators, thereby assigning individuals with a particular ethnic origin or religious belief to inhabit risky identities. This further raises the question of whether particular sub-groups in society that share such personal characteristics are more easily categorized by the State as suspicious, thereby constituting so-called suspect communities.

Moreover, the thesis will seek to assess whether pre-emptive counterterrorism surveillance of individuals, on basis of their religion or ethnicity, constitutes illegitimate differential treatment contrary to the protection of the right to non-discrimination. Central to this assessment is whether such application of pre-emptive surveillance measures can be considered necessary and efficient for counterterrorism purposes, and whether such difference in treatment poses a disproportionate negative burden on certain groups in

society. Against this background, the research question of this thesis is *how and in what ways does pre-emptive counterterrorism surveillance challenge the right to non-discrimination?*

In order to properly address and answer the research question, the following sub-questions are considered imperative for inquiry in the following analysis:

- i. What can the discourse on balancing national security objectives with human rights convey about the underlying distributive implications of counterterrorism policies?
- ii. How can the concept of indirect discrimination be applied to the differential treatment generated by the application of pre-emptive surveillance measures?
- iii. Does pre-emptive surveillance generate suspect communities and what consequences could this give rise to?

1.1 Research framework – the advancement of proactive criminal law

The legal and political developments catalysed by the terrorist attacks in the United States on 11 September 2001 have been accorded extensive academic attention. The following section will nonetheless outline the contemporary advancement of proactive criminal law internationally and nationally, as it arguably serves as a foundational point of departure for understanding the rationale underpinning the pre-emptive counterterrorism surveillance framework and its identification of risk, which is at the crux of the ensuing analysis.

The events of 11 September 2001 provided considerable momentum to the narrative on counterterrorism. Most fundamentally, the reinvigorated focus on terrorism prompted enactment of novel legislative measures both at the international and national level, pursuant to binding resolutions issued by supranational bodies such as the United Nations (UN) and the European Union (EU). An imperative feature of the counterterrorism framework has been the use of criminal law as a central instrument for providing the State with broader preventive tools such as pre-emptive surveillance measures.

Prior to 11 September 2001, the United Nations Security Council (UNSC) had sanctioned several resolutions denouncing terrorism, in addition to the adoption of the *International Convention for the Suppression of the Financing of Terrorism* in 1999. However, the terrorist attacks in the United States bestowed considerable impetus to the institution's preceding counterterrorism efforts. On 28 September 2001, the UNSC issued Resolution 1373,¹ which encouraged States to ratify the Terrorist Financing Convention, furthermore, required Member States to enact laws that in part would criminalize financing and preparatory acts of international terrorism. The Resolution marked the first time the UNSC utilized its authority under Chapter VII of the UN Charter by passing a binding resolution that Member States were obliged to implement domestically, leading commentators to argue that the Council acted as a global legislator.² One of the primary underlying reasons for adopting the Resolution has arguably been to ensure harmonization of criminal law internationally, thereby denying terrorists so-called safe havens in certain States.

The policies advanced by the UN at the international level were accompanied by the EU, which expedited the adoption of the *EU Framework Decision on Combating Terrorism*, adopted 13 June 2002. The Framework Decision coordinates the implementation of Resolution 1373, in part by streamlining all Member States' definition of terrorist offences under national law.³

The harmonization of criminal law for counterterrorism purposes at the international level has had notable legal and political implications: Firstly, by labelling certain acts as terrorist, increased penalties have been enabled. Secondly, in situations where police authorities suspect the commission of acts of terrorism, specific means of investigations such as surveillance may be warranted at an earlier stage and – specifically relevant for this thesis analysis – on lower grounds of suspicion. Lastly, corresponding to the recognition that terrorism is a global phenomenon that may transcend national borders, harmonization of

¹ S/RES/1373 (2001).

² Rosand 2004 p. 546.

³ EU Framework Decision (2002) Article 1.

criminal offenses has promoted international cooperation to a greater extent.⁴ Furthermore, by streamlining the criminal law pertaining to terrorism internationally, a narrower margin of appreciation has been provided to States on how to react to the heightened threat.⁵

Prior to the terrorist attacks in 2001, Norway had ratified all relevant UN conventions, the exception being the Terrorist Financing Convention, by amending the existing legal framework.⁶ Fulfilment of international agreements on counterterrorism was seen as sufficiently satisfied in the existing criminal law without adopting specific regulations, as crimes associated with terrorism such as murder or damage to property would be punishable under current provisions. Moreover, the use of covert coercive measures was strictly regulated and its scope of application limited.

It has been suggested that the Norwegian government perceived the threat of terrorism to be of little relevance to the domestic context prior to 2001.⁷ In a Norwegian Official Report (NOU) from 1993, it was explicitly expressed that acts of terrorism should be regarded in the exact same manner as other criminal acts; furthermore, accentuating that any particular focus on terrorism could lead to unwanted attention to the phenomenon.⁸ However, the terrorist attacks in 2001 changed this cognizance considerably. In accordance with Resolution 1373, the General Civil Penal Code of 1902 was amended by Act of 28 June 2002 No. 54 with the inclusion of section 147a and 147b. The former provision criminalises acts of terrorism and certain terror-related offenses and the latter financing of terrorism.⁹ Following the EU's adoption of the *Convention on the Prevention of Terrorism*, section 147c was included to the Penal Code in 2008, criminalising incitement, recruitment and training to terrorist acts.¹⁰

⁴ Weigend 2006 p. 913; see also Ot.prp.nr 8 (2007-2008) p. 315.

⁵ Warbrick 2004 p. 1002.

⁶ Bruce & Husabø 2009 p. 78.

⁷ Engene 2011 p. 234.

⁸ NOU 1993:3 p. 43.

⁹ General Civil Penal Code para 147a and 147b; the provisions superseded a provisional decree on the prohibition of terrorist financing from 5 October 2001, No. 1134.

¹⁰ EU Terrorism Convention (2005); General Civil Penal Code para 147c.

Planning and preparation of a terrorist act by means of conspiracy has been criminalized, pursuant to section 147a, third paragraph. The requirement of conspiracy implies that a perpetrator enters into an agreement with one or more persons to commit a future terrorist act as those enumerated in section 147a, first sentence. Additionally, following the terrorist attacks in Norway on 22 July 2011, supported by the “never again” mantra,¹¹ increased emphasis was given to the need to criminalise “lone wolf” or solo terrorism. Such criminalisation had been fervently opposed when debated years earlier, however, after considerable debates over the formulation of the provision, section 147a of the Penal Code was extended in 2013 with the inclusion of paragraph four, which criminalizes individual planning and preparation of a terrorist act, in cases where the intention to carry out the act is expressed by external actions.

A principal aspect of the counterterrorism legislation enacted pursuant to Resolution 1373 and the EU Framework Decision is the proactive character of the law, as it includes stricter and more extensive criminalisation of *preparatory* acts of terrorism. Criminal law has traditionally been reactive in nature, which entails that investigation and sanctioning occurs after a crime has been committed. The key element is thus the laws retrospective character. However, a proactive criminal law entails that acts are criminalized at an earlier stage in the sequence of events leading to what has traditionally been considered the commission of a crime. In the context of terrorism, it implies that ordinary lawful acts become criminal when done in preparation for a terrorist act. As a result, a fundamental objective is to detect criminal acts before the perpetration, signifying the preventive character of proactive criminal law.

It is important to note that the shift does not include a development of substitution where the reactive paradigm replaces the existence of the proactive one.¹² However, the proactive disposition of the provisions pertaining to terrorism should arguably be considered to

¹¹ See speech by Prime Minister Jens Stoltenberg 25.07.11.

¹² Jacobsen, 2009 p. 89.

represent a shift from traditional principles of criminal law, both at the international level and in the legal tradition of Norway that in part has novel implications for the covert coercive measures it enables.

This is arguably evident in relation to the conduct criminalized in Section 147 of the Norwegian Penal Code, as the provision places stronger emphasis on the subjective element of the perpetrator in assessing whether certain actions constitutes criminal acts. The establishment of criminal responsibility thus focuses to a greater extent on the perpetrator's motivation to commit a terrorist act in the future and not solely on the objective element of conduct.¹³ Such a composition of criminal responsibility raises several evidentiary questions in relation to criminal prosecution, which is beyond the scope of this thesis, however, more importantly for the present discussion are the practical consequences the law has for the utilization of pre-emptive surveillance methods in the examination of potentially criminal behaviour. As will be sought established in the following analysis, the increased focus on the *mens rea* element of the potential crime has arguably facilitated predictive assessments of future threats that to an increasing extent focuses on the personal characteristics of an individual, by employing religion and ethnicity as proxies for risk, thus creating particular risky identities.¹⁴

1.2 Definitions

This thesis is concerned with the pre-emptive surveillance practices applied by the Police Security Service. It thus follows that the main focus will be on the implications of pre-emptive surveillance measures applied domestically, pursuant to Norwegian law.¹⁵ Surveillance does not have one singular and coherent definition, however, a frequently adopted description is proposed by Lyon, who defines it as “*any collection and processing of personal data, whether identifiable or not, for the purposes of influencing or managing*

¹³ Hustad 2007 p. 25.

¹⁴ The term “risky identities” has been utilized by Mythen et al. in relation to how British Muslims have been labelled as “*dangerous, risky 'others'*” 2009 p. 738.

¹⁵ The thesis will not discuss derogations in times of public emergency. It should, however, be noted that Norway has not made any derogations in light of the implementation of counterterrorism objectives.

those whose data have been garnered".¹⁶ Surveillance of individuals may be separated as either targeted surveillance or mass surveillance, where the former speak about surveillance of a particular person or groups, while the latter implies undifferentiated surveillance of the population in general.¹⁷

The term "pre-emptive surveillance" will primarily be applied throughout this thesis in a context-specific manner. The context-specific definition describes the Police Security Service's information gathering for *preventive* purposes. The registration and treatment of information about individuals by the Police Security Service, it be collected by means of open sources or covert coercive measures, entails that the individuals concerned are under a form of surveillance. The EOS Committee, as evident in its unclassified reports, supports such a conceptualisation of surveillance.¹⁸ While it is incontestable that the use of covert coercive measures is a considerably more intrusive and adversarial surveillance method, it will be argued that forms of information gathering that does not require a judicial order is also relevant to examine as these should be considered as measures of surveillance. Furthermore, as this study is concerned with the potentially discriminatory and disproportionate application of pre-emptive surveillance, the measures will be referred to conceptually rather than separately, unless specifically stated otherwise.

1.3 Methodology

Counterterrorism surveillance is a multifaceted research area, which intersects with a number of academic disciplines.¹⁹ As this thesis is concerned with the implications pre-emptive counterterrorism surveillance has on the right to non-discrimination, an interdisciplinary approach is considered to be both pertinent and necessary. It is further deemed apposite as it arguably enables a broader conceptual and theoretical understanding of the questions at hand. The methodology applied is socio-legal research, employed with

¹⁶ Lyon 2001 p. 2.

¹⁷ Vermeulen & Bellanova 2012 p. 310.

¹⁸ EOS Committee Special Report 2013 p. 8.

¹⁹ See e.g. Bygrave 2010 on the multidisciplinary scholarship of surveillance studies, p. 59.

the aim of going beyond a *de lege lata* interpretation of the relevant positive legal rules, by consideration of the socio-political consequences generated by the application of the law. The interdisciplinary approach is furthermore considered appropriate, as my personal academic background is not in law.

The research has been conducted as a qualitative desk-study. The method of data collection has been document analysis of primary and secondary sources. The primary sources used include international human rights treaties, particularly the *International Covenant on Civil and Political Rights* (ICCPR), the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), in addition to judgments issued by the European Court of Human Rights (ECtHR). The treaties have been interpreted in accordance with Article 31 of the *Vienna Convention on the Law of Treaties* (VCLT), in addition to Article 38 of the *Statute of the International Court of Justice*. Furthermore, relevant Norwegian legal documents such as the Human Rights Act,²⁰ the General Civil Penal Code and the Police Act have constituted imperative primary sources.

The secondary sources applied have been monographs; journal articles; official documents issued by UN and EU bodies; reports issued by international, regional and national institutions; statistical surveys; and newspaper articles. The sources have been selected and interpreted with consideration over their reliability and subjective inclination. In particular, the reports used include unclassified documents issued by the EOS Committee. While acknowledging that these documents do not provide an exhaustive description of the pre-emptive surveillance practices of the Police Security Service, they have nonetheless been imperative for acquiring an understanding of the empirical application of pre-emptive surveillance measures in Norway.

²⁰ In 1999 the Norwegian parliament adopted the Human Rights Act, which purpose is to strengthen the status of human rights in Norwegian law. The Act incorporates the core international human rights instruments *inter alia* the ICCPR and the ECHR, which take precedence over other statutory provisions should there be a conflict, pursuant to the Act's para 2 and 3.

The methodological choices of this thesis reflect the absence of reliable empirical data to verify or falsify the presumptions that the analysis builds upon. This scarcity arguably constitutes a significant methodological limitation to the arguments and observations that this thesis proposes. Counterterrorism intelligence encompasses, by its very nature, classified national security concerns and confidential material on the private lives of individuals. It thus follows that any research conducted on this topic will be empirically deficient. However, this aspect should arguably not undermine the need for academic scrutiny, but rather reinforce the necessity of conducting research on a topic that to a considerable extent is premised on classified discretionary judgments.

Research conducted on the use and effects of *overt* counterterrorism measures, such as the practice of stop and search, have been examined and employed for comparative purposes. This approach has been chosen in order to infer and consider potential commonalities between the distributive implications generated by overt and covert surveillance measures adopted for counterterrorism purposes.

Given that the data collected are qualitative, the interpretation and conclusions drawn have been influenced by my personal predispositions. Attempts have accordingly been made to increase the reliability and quality of the research by seeking to substantiate material used with other comparable sources, thereby endeavouring to ensure the accuracy of the applied data.

1.4 Reader's guide

The forthcoming analysis is structured in a manner that seeks to accentuate the distributive implications of pre-emptive counterterrorism surveillance, by examining the potential challenges that such measures may have on the protection afforded by the right to non-discrimination. A fundamental aspect of any discussion concerning the legality and rationale of pre-emptive counterterrorism surveillance is arguably how to establish an appropriate relationship between national security objectives while simultaneously sustaining the protection of human rights.

Accordingly, chapter 2 will examine how politicians have invoked the concept of balance as a mechanism for determining the necessary response to heightened security threats. It will in part argue that the concept is a misguided tool for establishing such a relationship, primarily because it conceals the distributive implications that the balancing model inevitably involves. Rather, the principle of proportionality will be suggested as a considerably more cogent approach for evaluating permissible limitations on human rights generated by pre-emptive surveillance measures. The proportionality framework will be carefully examined, as this arguably serves as an imperative structure for the ensuing analysis that assesses the potential challenges pre-emptive surveillance has on the right to non-discrimination.

Chapter 3 accordingly introduces the scope of this right and the legal sources in which it is stipulated, emphasizing the legal framework concerning the protected grounds of ethnicity and religion. As the underlying assumptions about risks, which direct the application of pre-emptive surveillance measures and the effects they generate constitute pivotal issues in the thesis' analysis, the concept of indirect discrimination will be examined more carefully. Chapter 2 and 3 should thus be understood to compose the structural parameters for the subsequent discussion in chapter 4 and 5.

The aim of chapter 4 is to examine the extent to which the Police Security Service uses religion and ethnicity as proxies for risk in their assessment of potential threats, arguing that such categorization can be characterized as assigning individuals with risky identities. With the presentation of the applicable legal framework for pre-emptive surveillance conducted by the Police Security Service, it will be applied to assess the suitability and efficacy of using religion and ethnicity as predictive profiles in the attempt to foresee potential perpetrators. It will be argued that such predictive categorization has the capability to turn groups of individuals with a particular religion or ethnicity into suspect communities. Against this background, chapter 5 will examine the potential consequences of the creation of suspect communities and whether the disproportionate harm inflicted on these communities should be considered as amounting to indirect discrimination. Lastly, it

will examine how membership in suspect communities can give rise to processes of radicalisation; thereby accentuating the counterproductive results that pre-emptive surveillance measures may give rise to.

2 The concept of balance and the principle of proportionality

Counterterrorism policies raise imperative questions over how to establish an appropriate relationship between the implementation of increased security measures while sustaining human rights protection. An elementary feature of human rights law is that the majority of human rights provisions are not absolute, the exception being peremptory norms. The qualified nature of relative human rights signifies that their realization is contingent on considerations over co-existing and potentially competing individual rights or public interests. This inherent aspect of human rights law is expressly recognized in international and regional human rights instruments, manifested through limitation clauses that outline particular grounds that may justify a restriction, provided that certain standards are met.

The legal regime of human rights is consequently structured in a manner that has the capacity to accommodate the State's need to implement counterterrorism measures. Balancing human rights against such public interests is considered to represent a vital legal instrument for establishing permissible interferences with individual rights. In and of itself, balancing is thus an inherent aspect of legal human rights adjudication, epitomized through the principle of proportionality. However, within the political discourse on counterterrorism, a notably broader and considerably more intangible form of balancing has been proposed as the necessary response to questions over the compatibility between increased national security measures and the protection of human rights. The *concept* of balance is seen to represent a particularly pertinent metaphor for solving these issues. However, applying the concept of balance as a mechanism for determining how to establish the appropriate relationship between individual rights and the national security interests of the State is arguably misplaced, and should be understood as distinctly different from the legal principle of proportionality, for reasons that will be elaborated upon in the following.

2.1 The concept of balance

With the proliferation of counterterrorism policies, considerable attention has been given to the concept of balance as the necessary response for acquiring a suitable middle ground between national security and individual human rights. The concept has been invoked

repeatedly in debates by academics, policy-makers and legislators alike, as it is seen to represent a cogent approach to the legal and moral dilemmas raised in the effort to counteract terrorism.²¹ Dworkin argued in 1977 that “*the metaphor of balancing the public interest against personal claims is established in our political and judicial rhetoric, and this metaphor gives the model both familiarity and appeal*”,²² thus serving as a possible explanation to the concept’s allure.

However, despite the omnipresent use of the balancing metaphor, it has increasingly been subject to debate as several scholars have dismissed its usefulness.²³ Central to the discussion is the conceptual understanding of both security and human rights, and whether their association is one of compatibility or conflict. The following section will propose three interrelated reasons as to why the concept of balance arguably is an unfitting and overly reductive concept for understanding the relationship between national security interests and individual human rights.

2.1.1 Projects the balancing of security and human rights as a zero-sum game

By construction, the balancing model arguably assumes conflict. This is an inherent aspect in the balance metaphor, which entails that the increase of one scale, automatically involves the reduction of the other. In the context of counterterrorism policies, this zero-sum game is arguably problematic partly because it adopts a conceptualisation of national security and human rights that presupposes that the two objectives encompass concepts that are mutually exclusive.²⁴

In order to demonstrate the false premises of the perception of national security and human rights as diametrically opposed, scholars have argued that this understanding ignores the theoretical underpinnings that the objectives rely on. Liberal political theory elucidates how

²¹ See e.g. Ignatieff 2004; Løwer 2013; Rosen 2004.

²² Dworkin 1977 p. 198.

²³ See e.g. Luban 2005; Michaelsen 2006; Moeckli 2008; Zedner 2005.

²⁴ Posner & Vermeule 2007 p. 12.

security and liberty are reciprocal concepts and should, as a result not be projected as separated from each other. They assert that the ideology of liberalism highlights that a defining feature of liberal democracies is that any security measure can only be justified on basis of the pursuit of liberty, evoking the classical liberal view that individual freedom is a prerequisite for acquiring public security.²⁵ Liberty and security should thus be seen as mutually reinforcing.

Furthermore, the balance model's expectation of an inevitable trade-off between security and human rights is arguably misplaced because it assumes that protection of human rights is a separate issue from the protection of national security. The presumption underpinning the trade-off argument as reflected in the balancing model negates the fact that the human rights regime is structured to accommodate national security concerns.

2.1.2 Obscures the contention over right as trumps or interests

Placing national security and human rights within a balancing model is further problematic because it presumes that there is a self-evident answer to what weight the competing interests placed on the scales should be given. This premise obscures the fact that the conceptualisation of rights in relation to public interests is a distinctly vexed issue.

Rights theory contains a range of contrasting accounts on the relationship between individual rights and public interests.²⁶ One can arguably identify a bifurcation within the discourse, which key distinction is based on the extent to which rights are to be protected against communal goals.²⁷ While acknowledging the broadly sketched nature of the following classification, rights theorists concerned with these questions may be distinguished as advocates of a "pro-rights" or a "pro-balancing" conceptualization of competing principles.

²⁵ For an overview of liberalism's conceptualisation of the liberty-security nexus, see Michaelsen 2006 p 4-5.

²⁶ See e.g. Alexy 2002; Cohen 1999; Du Bois 2004; Dworkin 1977; Rawls 1971.

²⁷ The terms public interests and communal goals is used interchangeably in the following.

One of the most prominent advocates of the pro-rights division is legal theorist Ronald Dworkin, who has famously argued for defining rights as trumps. He asserts that rights should have a lexical priority over other collective interests. In part, this entails that rights should not be forfeited on the justification of a common greater good corresponding to the government's interest, furthermore, that rights are to be conceptualized as distinctly different from other societal values or interests.²⁸ Consequently, rights should enjoy safeguarding to the greatest extent possible prior to taking other interests such as national security into account.²⁹

By contrast, pro-balancing theorists do not confer a specific protection to rights as such, but rather consider rights to constitute fundamental interests similar to other collective goals of particular weight. Rights and collective goals are thus seen to have equivalent value, which implies that public interest may prevail over individual rights, should the public interest be deemed to have superior importance. Alexy illustrates this view by accentuating how rights are both principles and rules, best encapsulated as signifying "*optimization requirements*".³⁰ When two optimization requirements collide, these should be balanced against each other by means of a proportionality analysis.

It thus follows, that theories on rights as trumps and rights as interests propose competing understandings of the relationship between individual rights and collective interests, in which the advocates of the former view perceive the exercise of balancing to erode the fundamental protection rights are set out to secure, while proponents of the latter highlight how rights and interests are commensurable values that are well-suited for resolution within a framework of legal balancing. The priority given to the rights and interests that are to be weighed in the balance is accordingly not self-evident as presupposed by the balancing model. Whereas some scholars would prefer that rights were protected against the public interest of national security to the greatest extent possible, others would assert

²⁸ Dworkin 1977 p. 269.

²⁹ McHarg 1999 p. 673.

³⁰ Alexy 2002 p. 388.

that national security ought to enjoy the same protection as rights, provided that the balance does not constitute a disproportionate burden.

2.1.3 Presumes equal distribution

A third problematic feature of the concept of balance is that it arguably conceals the distributive implications that are generated when a compromise is sought established between national security concerns and human rights. The balancing model arguably presupposes that everyone will be equally affected by the outcome of the balancing exercise. When the concept of balance is invoked in relation to counterterrorism policies, it involves the assumption that increased security entails equal distribution of the benefits and burdens attached. However, as will be more carefully examined in chapter 4 and 5, while the rules governing the implementation of national security objectives are stipulated in a neutral manner, their application may affect certain individuals or groups disproportionately.

As a result, in the context of counterterrorism, the balancing model will necessarily involve normative considerations over perceived risks to national security and importantly, who are considered to constitute potential security threats. As pointed out by Moeckli, this aspect of the balance model raises the imperative question of whose rights are placed on the scales.³¹ Several scholars note that while the concept of balance conceals this inherent feature, it is commonly the security of the majority that is weighed against the liberty of the minority.³² This important element of the concept of balance arguably accentuates the utilitarian and politicized character of the balancing model.

However, while utilitarian considerations arguably are misplaced from a rights perspective, premised on the notion that all human rights are universal and inalienable, legitimate objections to the above argument could nonetheless be raised from the political perspective

³¹ Moeckli 2008 p. 3.

³² Luban 2005 p. 244; Moeckli 2008 p. 3; Waldron 2003 p. 191; Zedner 2005 p. 513.

of the State. Under international human rights law, States have a positive obligation to protect the individuals under their jurisdictions against potential harms caused by terrorism, to the greatest extent possible. For that reason, political considerations over how to fulfill such obligations may be accompanied by utilitarian calculations over how to protect the security of the greatest number of people. Measures employed to realize this duty, such as the use of counterterrorism surveillance, may thus constitute a necessary and justified interference with other human rights, as they contribute to ensuring the citizens' right to be free from the harm caused by terrorism. Moreover, the State may invoke individuals' "right to security" to emanate from this obligation.³³

Nonetheless, while recognizing the importance and validity of the State obligation to ensure such protection, the conceptualization of security as a basic right to be enjoyed by individuals arguably demands recognition of the right's ingrained distributive character. As asserted by Waldron, «*the distributive structure of rights is egalitarian, not maximizing*».³⁴ It thus follows, that an aggregative approach to security that adheres to utilitarian considerations of security maximization in a society must acknowledge the distributive implications involved when the State ensures its obligation to protect the security of its citizens.

2.2 The principle of proportionality

The following section will primarily address the principle of proportionality as applied by the ECtHR, as the Court's interpretation is considered most relevant for the Norwegian context. The pursuit of establishing a fair balance between public interests and individual human rights has repeatedly been affirmed as a fundamental aspect of the ECHR.³⁵ The ECtHR has applied the fair balance analysis to the majority of the rights enshrined in the instrument, thus reflecting the view that the search for a fair balance is "*inherent in the*

³³ Brown and Korff argue that the right to security has been "codified" in the jurisprudence of the ECtHR, pursuant to the judgment in *Osman v. the United Kingdom* (1998). Brown & Korff 2009 p. 9.

³⁴ Waldron 2010 p. 136.

³⁵ First established in *Belgian Linguistics case* (1968) para 7, confirmed in *Gogitidze and Others v. Georgia* (2015) para 97.

whole of the Convention".³⁶ Two of the most important functions of the fair balance objective are the principle of proportionality and the margin of appreciation doctrine.

Under international human rights law, the principle of proportionality signifies a conceptual framework for assessing the justifications for restrictions on human rights and whether these are permissible.³⁷ Any analysis concerning the principle of proportionality must commence by identifying the scope of the right in question and the legal limitations attached to it, if any, that would restrain its fulfilment.³⁸ Barak argues that the scope entails the right's underlying purpose, which is constant, regardless of whether other interests or rights are weighed against it. However, the rights of others or specific interests of the State may condition the fulfilment of the right.³⁹ According to the traditional understanding of the principle of proportionality, which construction is often credited to German lawmakers,⁴⁰ it embodies three separate, yet interrelated sub-principles of legality, necessity and proportionality *stricto sensu*.⁴¹

2.2.1 ECtHR's approach when adjudicating permissible limitations on rights

The ECHR does not contain a general limitation clause, but include specific restrictions attached in the second paragraph to each of the substantive rights stipulated in Article 8 to 11, which are structured in a comparable manner. The ECtHR has developed a standard procedure for adjudicating whether an imposed limitation on an individual right is permissible, which includes three cumulative criteria assessing the legality of the measure; the legitimacy of the aim pursued; and lastly, whether the interference was necessary in a democratic society. While it has been argued that the proportionality assessment permeates the Court's entire interpretation of the ECHR,⁴² the proportionality principle is arguably most pertinent in the third stage. However, in order to provide a comprehensible account of

³⁶ Sporrong and Lönnroth v. Sweden (1982) para 69.

³⁷ Christoffersen 2009 p. 163.

³⁸ Barak 2010 p. 5.

³⁹ Barak 2010 p. 6.

⁴⁰ Gunn 2005 p. 564.

⁴¹ Christoffersen 2009 p. 69.

⁴² Van Dijk & Van Hoof 1998 p. 80.

how the principle of proportionality is manifested in the judicial reasoning of the Court, the two first tests on legality and legitimacy will be provided for in the following:

2.2.1.1 In accordance with the law

The first criterion for establishing whether an interference is permissible requires the limitation to be prescribed by law. It is additionally required that the respective provision is of certain legal quality, which entails that the rule must be compatible with the objectives encapsulated in the legality principle, namely accessible and foreseeable, thereby ensuring compliance with the rule of law.⁴³ It is thus required that the law is formulated in a precise and understandable manner. In the *Kruslin* judgment (1990), which concerned covert surveillance techniques, the Court stated, “*it is essential to have clear, detailed rules on the subject, especially as the technology available for use is continually becoming more sophisticated.*”⁴⁴

2.2.1.2 In pursuit of a legitimate aim

When the ECtHR assesses whether the interference pursues a legitimate aim, it will typically consider whether the aim had an objective justification. The Court has repeatedly stated that the fight against terrorism constitutes a legitimate national security aim, which implies that this criterion is usually easily satisfied in cases concerning restrictions based on national security.⁴⁵

2.2.1.3 Necessary in a democratic society

The third and final stage of the adjudication procedure conducted by the ECtHR is the assessment of whether the interference is necessary in a democratic society. The Court has interpreted the condition of necessity to imply that the interference in question must “*correspond to a pressing social need*”,⁴⁶ furthermore, that it is proportionate to the legitimate aim pursued. The Court does not as such apply the three-pronged framework of

⁴³ *Malone v. the United Kingdom* (1984) para 67.

⁴⁴ *Kruslin v. France* (1990) para 33.

⁴⁵ *Zana v. Turkey* (1997) para 50; Fura & Klamburg 2013 p. 471.

⁴⁶ First established in *Handyside v. the United Kingdom* (1976) para 48, confirmed in *Khan v. Germany* (2015) para 36.

suitability, necessity and proportionality for assessing the democratic necessity-test,⁴⁷ however, the three criteria may nonetheless be considered to be of constructive guidance for the present discussion.⁴⁸

2.2.1.3.1 Suitability

The test of suitability will be satisfied if established that the interference in question is suitable or effective for realizing the legitimate aim. By consequence, this test necessitates an assessment over the causal relationship between the means employed and the end sought achieved. While the suitability requirement will be more easily satisfied in certain cases where the means applied for securing the aim are apparently effective, questions that are more open-ended and difficult to measure the efficiency of, for instance whether ethnic profiling by police authorities should be considered an efficient method for protecting national security, are considerably more complex. While the ECtHR rarely demands the State to demonstrate that the measure in question is entirely effective for securing its objective, it will have to be established that the measure has such capacity.⁴⁹

2.2.1.3.2 Necessity

The necessity criterion requires that there is no other equally satisfactory measure available that would impair the right to a lesser extent.⁵⁰ This implies that should there be other less intrusive means at the disposal of the State that would achieve the aim sought equally well, the interference would be deemed impermissible. Should the State for instance adopt covert coercive measures when the information sought gathered could be just as efficiently obtained from the use of less restrictive methods, the necessity requirement of the chosen measure could be questioned. The ECtHR has, however, applied a necessity criterion that is less stringent than the “least-intrusive-means” test suggests, where the usefulness or reasonableness of the measure is the imperative parameters for assessment.⁵¹ Furthermore,

⁴⁷ Christoffersen 2009 p. 163.

⁴⁸ Gerards 2013a p. 468; Murphy 2013 p. 75.

⁴⁹ Gerards 2013a p. 474.

⁵⁰ Brems & Lavrysen 2015 p. 4.

⁵¹ Gerards 2013a p. 483.

the jurisprudence of the Court shows that effective guarantees against abuse are considered indispensable, which arguably is of particular importance in relation to the use of secret surveillance systems.⁵²

2.2.1.3.3 *Proportionality stricto sensu*

Proportionality in the strict sense requires that there is an appropriate correlation between the benefit obtained from the restrictive measure that limits the right and the disadvantage caused to the right by the limitation.⁵³ It is this stage of the proportionality framework that embodies the balancing exercise, where the benefits and burdens of the limitation are weighed against each other. The strict application of the proportionality analysis will accordingly have to assess the effects the limitation has on the right-holder(s) and is by consequence a “*value-laden*” exercise.⁵⁴ Whereas the concept of balance uncritically places national security and human rights on each side of the scale without further examination of the underpinning considerations, this criterion requires that the restrictive measure in question be balanced against the limited right, for the purpose of determining whether the advantage provided from the limitation outweighs the imposed burden.

2.2.2 The margin of appreciation doctrine

An imperative method of interpretation intrinsically linked to the necessary in a democratic society test is the margin of appreciation doctrine, which is a judge-made method of adjudication developed and employed by the ECtHR. It concerns the scope of discretion that the Court may bestow upon national authorities in their fulfilment of the obligations enshrined in the ECHR. Up until the adoption of Protocol 12 to the ECHR in 2013, which amends the preamble to the Convention with an explicit reference to how the States enjoy a margin of appreciation, the legal basis for the doctrine could only be found in the jurisprudence of the Court.⁵⁵

⁵² *Malone v. the United Kingdom* (1984) para 49-50.

⁵³ Barak 2010 p. 7.

⁵⁴ Barak 2012 p. 342.

⁵⁵ Protocol No. 12 to the ECHR, Article 1.

A vital starting point when examining the margin of appreciation doctrine is the recognition of the principle of subsidiarity, which permeates the ECHR and is intrinsically linked to the discretion provided to States. The principle entails that the protection afforded by the Convention system is secondary to the implementation and protection of human rights at the national level, thereby recognising that national authorities are the primary duty bearers of enforcing and securing the Convention rights.⁵⁶

Accordingly, the margin of appreciation doctrine functions as an interpretative tool for the Court to “*structure the area of friction between international supervision and national sovereignty*”⁵⁷. The doctrine proceeds on the recognition that the authorities of the States Parties may be better equipped to determine the suitable regulatory response to issues concerning rights protection within their jurisdiction.⁵⁸ Accordingly, the margin of appreciation is an imperative analytical instrument for determining whether an interference with a qualified right is deemed permissible in cases where the justification for the limitation is based on national security.

While the case law of the Court traditionally has reflected that the margin of appreciation afforded to States on matters of national security has been uniformly broad, recent jurisprudence exhibits that the discretion varies depending on the subject matter of the right in question and the nature of the restriction.⁵⁹ Consequently, while the Court has stated that States enjoy a wide margin when determining the appropriate means for achieving the legitimate aim of protecting national security,⁶⁰ the case law demonstrates that rights infringements justified on basis of counterterrorism strategies does not automatically fall within the States’ own discretion. Any assessment over whether a limitation upon a right on basis of national security is deemed permissible will be subject to a proportionality analysis as expressed above.

⁵⁶ Tümay 2008 p. 202.

⁵⁷ De la Rasilla del Moral 2006 p. 615.

⁵⁸ Gross & Ni Aolain 2001 p. 626.

⁵⁹ Smith 2011 p. 125; Council of Europe Report 2013: 40.

⁶⁰ Leander v. Sweden (1987) para 59.

2.3 Conclusive remarks

The aforementioned analysis of the concept of balance and the legal proportionality framework arguably shows that the principle of proportionality as applied in international human rights law, is by comparison a considerably more complex exercise of assessing whether an infringement on an individual right can be deemed permissible pursuant to national security aims. Invoking the concept of balance as the necessary and appropriate response to the competing interests raised by counterterrorism policies should arguably be avoided, as its reductive character conceals the choices that underpin the implementation of national security objectives and who these are directed at, thus precluding recognition of the distributive implications involved. The following analysis will proceed by examining how the right to non-discrimination accommodates differential treatment generated by national security objectives and consider how the principle of proportionality becomes manifested in assessments over the objective and reasonable justification necessitated by such differentiation.

3 The human right to non-discrimination

A foundational tenet of the principle of non-discrimination is that every person has a right to be judged as an individual and not as part of a group.⁶¹ Notwithstanding the prominence accorded to the right to equality and non-discrimination within international human rights law, the theoretical interpretations of the principles scope and exact content are manifold and often not in concord. One issue of contention is whether the two principles should be regarded as distinct concepts⁶² or simply as two sides of the same coin.⁶³ The most common understanding of equality and non-discrimination in international human rights law is that the two concepts constitute the positive and negative expression of the same principle. The following analysis will proceed on the premise that the concepts of equality and non-discrimination may be regarded unitarily on basis of their reciprocal character. However, it should be recognized that the constitutive components of the right to equality and non-discrimination as expressed in international human rights law have separate functions as well as different normative underpinnings. They should as a result not be considered as a single norm. Moreover, given that the focus of this study centres on the prohibition on non-discrimination, the conceptual understanding of equality will acquire a less prominent role in the forthcoming analysis.

This chapter will outline the legal sources on the right to non-discrimination, at the international, regional and national level. Furthermore, it will examine the relevant criteria applicable when examining whether claims of differential treatment are considered permissible. However, given the extensiveness of the field of non-discrimination law, the scope of the legal sources and their interpretation will primarily be assessed in relation to the protected grounds of ethnic origin and religion, as these are considered most relevant for the differential treatment that can arise from the application of pre-emptive surveillance measures. Lastly, the chapter will examine the concept of indirect discrimination as a

⁶¹ Fredman 2002 p. 66; Blaker Strand 2007 p. 131.

⁶² See e.g. Pobjoy 2010 p. 197; MacNaughton 2009 p. 48.

⁶³ See e.g. Morsink 1999 p. 45.

framework for assessing the potentially disproportionate effects that the application of pre-emptive counterterrorism measures may have on groups seen to inhabit risky identities, on basis of their shared personal characteristics.

3.1 Legal sources on the right to non-discrimination

3.1.1 International law

The principles of equality and non-discrimination are considered to be “*the most frequently declared norms of international human rights law*”,⁶⁴ as their protection and realization have been regarded as one of the most significant objectives of the human rights paradigm.⁶⁵ Provisions relating to the protection of equality and non-discrimination may be conceptually divided as either accessory or autonomous. With the exception of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), all the core UN instruments on human rights contain a broadly similarly worded accessory provision on equality and non-discrimination, which scope is limited to the application of the substantive rights set forth in the respective conventions. However, the legal epitome of the right to non-discrimination is arguably to be found in Article 26 of the *International Covenant of Civil and Political Rights* (ICCPR). The article reiterates the accessory content of Article 2(1) in the respective Covenant, yet more importantly; it additionally embodies an autonomous prohibition on discrimination. The article reads:

*“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*⁶⁶

⁶⁴ Bayefski 1990 p. 2.

⁶⁵ Nowak 2005 p. 599.

⁶⁶ ICCPR Article 26.

It thus follows, that Article 26 encompasses a three-folded obligation: Equality before the law requires equality in relation to the enforcement of the law, which entails that State officials such as judges or administrative personnel are not to apply the law arbitrarily or discriminatorily.⁶⁷ Equal protection of the law signifies *de jure* equality, meaning that all persons shall be provided with the same legal rights and duties without discrimination.⁶⁸ Lastly, the protection against discrimination is to be regarded as an overarching principle, “*circumscribing the legitimacy of the laws themselves*”.⁶⁹

The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) is exclusively concerned with racial discrimination. Compared to the protection afforded in the ICCPR and the ECHR, which will be examined below, the protection against discrimination provided in the ICERD could be considered as broader and more dynamic, given that the instrument regulates different positive State obligations arising from the provisions stipulated in the convention.⁷⁰

3.1.2 Regional law

At the regional level, the ECHR provides an accessory norm on non-discrimination in its Article 14, which may only be invoked in conjunction with other Convention rights. However, the ECtHR has accentuated that the provision is accessory in scope, but autonomous in its meaning, which entails that the Court might find a violation of Article 14, regardless of whether there is a breach of other substantive Convention rights.⁷¹ Accordingly, potential claims within the ambit of Article 14 arising from the discriminatory application of pre-emptive surveillance measures could for instance be invoked in conjunction with Article 8 on the right to privacy or Article 9 on freedom of religion. With the adoption of Protocol No.12 to the ECHR, which entered into force in 2005, the protection against discrimination is considerably extended, as Article 1 of the Protocol

⁶⁷ Joseph & Castan 2013 p. 768.

⁶⁸ Vandenhoe 2005 p. 18.

⁶⁹ Joseph & Castan 2013 p. 768.

⁷⁰ Kjærø 2006 p. 48.

⁷¹ Arnardóttir 2003 p. 36.

stipulates that the principle of non-discrimination shall apply to “*any right set forth by law*”.⁷²

3.1.3 National law

Over the last decade, Norway has introduced substantial amendments in the legal framework on anti-discrimination. With the bicentennial anniversary of the Norwegian Constitution in 2014, significant constitutional amendments were made, among others the inclusion of a separate clause on non-discrimination stating that everyone shall be equal before the law; furthermore, that no human being shall be subjected to unjust or disproportionate differential treatment.⁷³ The ICERD is incorporated in Norwegian law through the Anti-Discrimination Act.⁷⁴

In 2013 the Ethnicity Anti-Discrimination Act was passed, which provides protection against ethnic discrimination.⁷⁵ The purpose of the Act is to promote equality irrespective of ethnicity, religion and belief and applies in all sectors of society, with the exception of family life and other purely personal relationships.⁷⁶ The law prohibits both direct and indirect discrimination on the grounds of ethnicity, national origin, descent, skin color, language, religion or belief, defining indirect differential treatment as «*any apparently neutral provision, condition, practice, act or omission that results in persons being put in a worse position than others, and that occurs on the basis of ethnicity, religion or belief.*»⁷⁷ Hence, as noted by Blaker Strand, indirect discrimination can be established without actual proof of discrimination, as evident in the aforementioned provision’s wording of a person “*being put*” in an adverse position than others. This indicates that indirect discrimination can be demonstrated if a rule of practice has the capacity to discriminate.⁷⁸ Furthermore,

⁷² Protocol No. 12 to the ECHR Article 1.

⁷³ Norwegian Constitution para 98 (unofficial translation).

⁷⁴ Anti-Discrimination Act Section 2.

⁷⁵ Ethnic Anti-Discrimination Act. The Act superseded the earlier Anti-Discrimination Act (Act no. 33 of 3 June 2005).

⁷⁶ Ethnic Anti-Discrimination Act Section 1, 2.

⁷⁷ Ethnic Anti-Discrimination Act Section 6.

⁷⁸ Blaker Strand 2007 p. 145.

the Act authorizes differential treatment, provided that it has an objective purpose; it is necessary to achieve the purpose; and the negative impact of the differential treatment on the person or persons whose position will worsen is reasonably proportionate in view of the intended result.⁷⁹

In 2003 Norway signed Protocol No. 12 to the ECHR, however, it has not yet been ratified. A committee appointed by the government in 2009 discussed the issue of ratification, where the majority decided against it, in part by arguing that there were too many unanswered questions pertaining to the personal and material scope of the Protocol.⁸⁰ It has, however, been suggested that the refusal to ratify the Protocol concerns the fear that it could generate an increase in complaints to the ECtHR and thereby limiting the political freedom of the government,⁸¹ an arguably sound proposition, given that the material scope of Article 26 of the ICCPR is broader.

3.2 Interpreting the right to non-discrimination

The ICCPR does not contain a definition of discrimination or an exposition of what constitutes discrimination. However, in General Comment No. 18 (1989) the Human Rights Committee (HRC) provides an explanation of the term, deduced from the definition of discrimination stipulated in the ICERD, which considers discrimination to signify “*distinction, exclusion, restriction of preference*”, based on any ground, “*and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.*”⁸²

However, the right to non-discrimination does not entail that every differentiation of treatment constitutes a violation of the norm. The ECtHR in particular has contributed to the understanding of the distinction between legitimate differential treatment and wrongful

⁷⁹ Ethnic Anti-Discrimination Act Section 7.

⁸⁰ NOU 2009:14 para 24.7.2.

⁸¹ Bårdsen 2004 para 9.

⁸² HRI/GEN/1/Rev.9 para 7.

discrimination, where the elaboration in the *Belgian Linguistic Case* (1968) is still considered instrumental. In this judgment, the Court stated that:

*“The principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.”*⁸³

While there are variations in the formulations of the tests that must be established, one can arguably infer from the above excerpt the following criteria to be applicable for the determination of whether differential treatment is permissible: Firstly, one must establish the existence of differential treatment; secondly, whether there is an objective and reasonable justification for the differentiation; and lastly, assessing whether the differential treatment is proportional to the legitimate aim of differentiation.⁸⁴

3.2.1 Establishing differential treatment

In order to establish a *prima facie* case of discrimination, one must show that there has been a differentiation in treatment. This necessitates that the requirement of comparability is satisfied. The comparator requirement entails that the applicant must establish that in comparison to an individual or a group in a similar situation, he or she has suffered from disadvantageous treatment as a consequence of belonging, or being perceived to belong, to a protected group. The prohibition on discrimination may also be engaged in cases where persons in specifically different situations are treated equally.⁸⁵ The ECtHR usually require the applicant to satisfy the comparability test by establishing an “analogous” situation,

⁸³ Belgian Linguistics case (1968) para 10.

⁸⁴ Arnardóttir 2003 p. 41.

⁸⁵ Moeckli 2008 p. 76.

however, there are cases where the test is applied as part of the reasonable and objective justification assessment, thereby changing the burden of proof onto the respondent State.⁸⁶

3.2.2 Objective and reasonable justification

If a difference in treatment is found to be a *prima facie* violation of the right to non-discrimination, it might nonetheless be deemed compatible with the stipulated provisions, provided that the differentiation has an objective and reasonable justification. In practice this entails that the purpose of the difference in treatment must serve a legitimate aim and that the means employed must be proportionate to the aim sought.

In statements issued by UN treaty bodies it is accentuated that the difference in treatment must be compatible with the aim and purpose of the human rights instrument. This qualifying aspect is arguably important, as the assessment of what is deemed reasonable may be highly subjective. While the criterion of objectivity may suffer from the same subjective disposition, the recognition of the immaterial role of discriminatory intent makes the objectivity test more easily satisfied.

As confirmed in chapter 2, it is normally unproblematic for the responding State to prove that the difference in treatment pursues a legitimate aim, such as national security, as the assessment typically concentrates on the aim itself, without considering the underlying rationale of the aim, its efficacy or the consequences it might generate. This has led commentators to argue that the legitimate aims test is “*completely toothless in combating discrimination*”.⁸⁷ Adhering to the principle of subsidiarity, the ECtHR rarely engages notably with these issues, which accordingly elucidates that the primary issue of concern for the Court when assessing the legitimate aims test is to confirm that the difference in treatment was not a result of discriminatory intent.⁸⁸ It could thus be argued that the legitimate aim test is fairly redundant.

⁸⁶ Arnardóttir 2014 p. 661.

⁸⁷ Arnardóttir 2003 p. 44.

⁸⁸ Lochak 1990 p. 139.

The second criterion of the objective and reasonable justification test involves the proportionality assessment over the differentiation in question and the legitimate aim sought realised. As declared in the *Belgian Linguistics* case, Article 14 will be violated if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. Judgments from the ECtHR on Article 14 demonstrate that the proportionality analysis as part of the test to determine whether differential treatment has been permissible is in conformity with the general principle of proportionality employed in relation to substantive Convention rights. As a result, the Court will necessarily assess the applicable criteria in relation to the fair balance doctrine, and furthermore, allow the State with a certain margin of appreciation. As will be elaborated upon below, States are normally granted a more restricted margin in cases that concerns differential treatment on basis of ethnicity or religion. However, the extent to which the Court actually considers questions over whether there is a suitable balance between the means employed and the aim sought in relation to the proportionality assessment in the objective and reasonable justification stage varies.⁸⁹

3.2.3 Protected grounds and State discretion

When claims of discrimination are brought before a judicial body, the standard of review will be contingent on several factors. Most importantly, the ground upon which the difference in treatment is based will impact the discretion afforded to the State, furthermore, affect the perceived legitimacy of the justifications for the differentiation. The ECtHR has stated that the margin of appreciation afforded to States in cases concerning a difference in treatment will differ according to “*the circumstances, the subject matter and its background.*”⁹⁰ Importantly, the standard of review will be influenced by the protected ground invoked, especially in relation to so-called “suspect” grounds, denoting potentially prejudicial characterizations of groups that historically have been at a disadvantageous position in society, thus necessitating particularly strong justifications on behalf of the

⁸⁹ O’Connell 2009 p. 225.

⁹⁰ Rasmussen v. Denmark (1984) para 40.

State.⁹¹ While the ECtHR does not operate with the term “suspect grounds” as such, the Court will require “*very weighty reasons*” in order to justify differentiations based on such distinctions.⁹²

Provisions on non-discriminations contain an attached enumeration of grounds of discrimination that are prohibited. Article 26 of the ICCPR and Article 14 of the ECHR comprise an illustrative catalogue of prohibited categories of discrimination, as the listing in both instrument are prefaced by the wording “*any ground such as*”, and furthermore, includes the category “*other status*”. Article (1) of the ICERD, however, stipulates a closed enumeration of protected grounds, limited to the thematic scope of the instrument.

The HRC has employed the classification of “*other status*” to encompass several alternative bases for differential treatment.⁹³ The Committee on the Elimination of Racial Discrimination (CERD) has taken the position that there shall be no hierarchy of discriminatory grounds,⁹⁴ whereas the HRC, by contrast, has given priority to the enumerated distinctions stipulated in Article 26, especially in relation to suspect grounds. However, given the broadly defined scope of the category “*other status*”, commentators argue that the practice of the HRC suggests that the treaty body does not necessarily consider the grounds for discrimination as an imperative variable in an assessment over a claim of discriminatory treatment.⁹⁵ Notwithstanding the foregoing, it should be noted that the HRC has been reluctant to consider claims of indirect discrimination unless the rule in question has had a negative effect of a group explicitly enumerated in Article 26.⁹⁶

⁹¹ de Schutter 2011 p. 14.

⁹² First cited in Abdulaziz, Calabes and Balkandali v. the United Kingdom (1985) para 78, confirmed in Emel Boyraz v. Turkey (2015) para 51.

⁹³ Vandenhoele 2005 p. 183.

⁹⁴ CERD/C/63/CO/11 para 15.

⁹⁵ Joseph et al. 2004 p. 686.

⁹⁶ Schiek 2007 p. 338.

When determining whether an individual could be distinguished as member of one of the protected grounds, self-identification by the respective individual is sufficient, unless no justification exists to the contrary. Perceived or associated membership with a group is further included.⁹⁷ Differential treatment on basis of the protected grounds of ethnicity and religion should arguably be considered to be most relevant for individuals designated with risky identities and thus selected for pre-emptive surveillance measures.

Ethnic origin is considered to possess the status of suspect ground by the UN treaty bodies and the ECtHR, thus necessitating considerably strong justifications for differentiation. The ECtHR has stated, “*no difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary society built on the principles of pluralism and respect for different cultures.*”⁹⁸ Protection of religion, however, is more ambiguous. While it is a protected ground under both the ICCPR and the ECHR, the ICERD does not explicitly prohibit discrimination on grounds of religious belief. Nevertheless, the CERD has found discrimination on grounds of race, ethnicity or national origin to constitute religious discrimination, as they exist in combination, thus invoking the concept of intersectionality or multiple discrimination.⁹⁹

The question over whether religion should be considered a suspect ground and thus resulting in a stricter review has additionally been unsettled in the jurisprudence of the ECtHR. While recognizing it as such in the Hoffman case,¹⁰⁰ it has been argued that the Court seemingly does not categorize religion as a suspect.¹⁰¹ However, in the recent case of *Vojnity v. Hungary*, the ECtHR stated that differentiation on basis of religion required very

⁹⁷ E/C.12/GC/20 para 16; HRI/GEN/1/Rev.7 p. 203.

⁹⁸ *Timishev v. Russia* (2005) para 58.

⁹⁹ CERD/C/GC/32 para 7. See also Berry 2011.

¹⁰⁰ *Hoffman v. Austria* (1993) para 36.

¹⁰¹ de Schutter 2011 p. 5; Henrard 2013 p. 246.

weighty reasons, thus potentially confirming the strictness of review in cases concerning religious discrimination.¹⁰²

Several commentators have taken issue with the ECtHR's arguably erratic interpretation of the various grounds of discrimination, that are said to suffer from an inconsistent line of theoretical reasoning.¹⁰³ According to this view, the Court has adopted two diverging lines of interpretation in relation to the type of differential treatment that would engage Article 14. One approach has been an arguably textual interpretation of the provision and the non-exhaustive list of grounds, thereby rendering nearly any form of differential treatment within the ambit of a Convention right admissible, regardless of a consideration of which discriminatory ground the differentiation in question would pertain to.¹⁰⁴

By contrast, the differing approach, which seemingly has acquired a more prominent role in recent jurisprudence, is the consideration of "*other status*" to imply that a difference in treatment must be based on "personal status", indicating "*an innate characteristic that applies from birth*",¹⁰⁵ or alternatively, personal attributes essential to individual autonomy, such as religion.¹⁰⁶ While critics acknowledge the Court's recent effort to combine the two diverging approaches, as exemplified in the judgment of *Carson* (2010),¹⁰⁷ they nonetheless perceive the Strasbourg tribunal's application of Article 14 as inchoate, furthermore, that the disparate reasoning of what constitutes a discrimination ground may suggest an unpredictable conceptualisation of the protected grounds.¹⁰⁸ The aforementioned considerations may, however, be ameliorated with the Court's heightened focus on the social context in which the differential treatment occurs, signalling a move from primarily focusing on issues of formal equality towards greater recognition of substantive equality, in

¹⁰² *Vojnity v. Hungary* (2013) para 36.

¹⁰³ Gerards 2013b p. 104; Arnardóttir 2014 p. 660.

¹⁰⁴ See e.g. *Engel and Others v. Netherlands* (1976) para 72 and *Rasmussen v. Denmark* (1984) para 34; *Grande Oriente d'Italia di Palazzo Giustiniani v. Italy* (2007) para 56.

¹⁰⁵ *Sampanis and Others v. Greece* (2008).

¹⁰⁶ Gerards 2013b p. 105.

¹⁰⁷ *Carson and Others v. United Kingdom* (2010).

¹⁰⁸ Gerards 2013b p.113; Small 2003 p. 56.

part illustrated through considerations over indirect discrimination, which will be examined further below.¹⁰⁹

3.3 The concept of indirect discrimination

The concept of indirect discrimination has evolved as an alternative framework for establishing impermissible differential treatment. The definition of discrimination adopted by UN treaty bodies accent that laws or measures may have a discriminatory purpose or *effect*, thus accentuating that discrimination may be indirect as it is effects-based. Whereas direct discrimination denotes unjustifiable differential treatment that occurs on basis of a prohibited ground, indirect discrimination materializes when an apparently neutral measure has an adverse and disproportionate effect on a particular group, in the absence of an objective and reasonable justification.¹¹⁰ As noted by Schiek, while the recognition of direct discrimination may involve considerations over social reality, the former prohibition is primarily concerned with ensuring formal – or *de jure* – equality between individuals, whereas indirect discrimination thus concentrates on the effects or consequences of certain laws or measures.¹¹¹

The concept of indirect discrimination is underdeveloped in the case law of the ECtHR as the Court has been, and arguably continues to be, reluctant to employ it. However, the concept has been applied in recent judgments, particularly relying on case law from the European Court of Justice (ECJ), signalling an extension in the protective scope of Article 14.¹¹² The ECtHR has ruled that impermissible differential treatment may occur not only from legislative measures, but also from a “*de facto situation*”.¹¹³ Discriminatory intent will thus not be required for establishing a possible case of discrimination. Nevertheless, as evidenced in the landmark decision on indirect racial discrimination of *D.H. and Others v.*

¹⁰⁹ Arnardóttir 2014 p. 657.

¹¹⁰ OHCHR Report 2004 para 12.

¹¹¹ Blaker Strand 2007 p. 141; Schiek 2007 p. 328.

¹¹² Due to space constraints, the thesis will not discuss the ECJ’s interpretation and application of the concept of indirect discrimination. See Tobler 2005 for further analysis.

¹¹³ Zarb Adami v. Malta (2006) para 76.

Czech Republic, the Court places a strict burden upon the applicant to demonstrate that indirect discrimination has taken place, as the disadvantageous treatment must be substantiated by statistical evidence.¹¹⁴ In the aforementioned case, the Court ruled; “*statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce*”.¹¹⁵ However, in cases concerning allegations of religious or ethnic discrimination, it can be particularly challenging for the applicant to provide sufficient evidence of differential treatment, which clearly will be further exacerbated in situations where differential treatment have occurred covertly, as with pre-emptive surveillance. Nevertheless, the ECtHR has stated that if the incident at issue lies within the exclusive knowledge of the State, the burden of proof may shift.¹¹⁶

Should the indirect discrimination be *prima facie* established, the assessment of objective justification will be reviewed. One can arguably assume that in cases concerning claims of indirect discrimination on basis of suspect grounds such as ethnicity or religion, the Court will provide the State with little leniency when assessing the justification for the differential treatment. However, one may nevertheless question whether the pursuit of certain national security objectives as the legitimate aim for differentiation will lead to a deferential stance by the Court, thus diluting the concept and the scope of successfully proving discrimination.

It thus follows, that from a normative point of view, the concept of indirect discrimination may be considered as a suitable framework for assessing the implications of applying pre-emptive surveillance towards particular groups encompassing risky identities, on basis of their common religious beliefs or ethnic origin. Furthermore, the concept’s focus on group rather than individual equality; arguably makes it particularly apposite for examining the disproportionate harm that may be inflicted by a neutral measure, such as the rules

¹¹⁴ D.H. and Others v. Czech Republic (2007); Harris et al. 2009 p. 617.

¹¹⁵ D.H. and Others v. Czech Republic (2007) para 188.

¹¹⁶ Salman v. Turkey (2000) para 100; Anguelova v. Bulgaria (2002) para 111.

governing the application of pre-emptive surveillance measures. However, in regard to the judicial application of the concept, one can arguably identify several potential limitations that can render the concept unfit for establishing impermissible disadvantageous treatment. It could be argued that a notable limitation to the concept is the fact that in addition to having to provide sufficient statistical evidence, it has to be established that the disadvantageous treatment emanates from a suspect ground. This might be specifically challenging to demonstrate in cases concerning national security where the discretion of the State is significant, thus rendering the objective justification more easily established.

3.4 Conclusive remarks

This chapter has sought to establish that permissible restrictions on the right to non-discrimination, on basis of the protected grounds of ethnicity or religion, necessitate particularly strong justifications from the State. However, this test may be more easily satisfied when in pursuit of national security objectives. The analysis has further accentuated that the concept of indirect discrimination could be considered an apposite framework for examining the potential effects that pre-emptive counterterrorism surveillance measures may have on particular groups of individuals considered to inhabit risky identities, as its protective scope extends to the situation on the ground.

Recognizing the vital importance of the principle of proportionality in assessments over whether differential treatment has an objective and reasonable justification, it thus follows that a central issue for examination in the following analysis is whether the pre-emptive surveillance measures employed for counterterrorism purposes, and the differences in treatment they entail, should be considered as suitable and effective. Furthermore, chapter 5 will examine whether such differentiation may be considered to satisfy the criterion that the measures shall not impose an excessive disadvantage to the people involved in relation to the aim sought. Central to this discussion is the aforementioned concept of indirect discrimination and the examination of whether neutral pre-emptive surveillance measures involve disadvantageous treatment of particular groups in society.

4 Pre-emptive counterterrorism surveillance

The following chapter will examine how the paradigm of prevention's objective of predicting future threats to national security has led to an intensified focus on an individual's personal characteristics, arguing that religion and ethnicity has come to constitute proxies for risk. It will further assess the legal framework pertaining to the pre-emptive surveillance measures employed by the Police Security Service and examine whether predictive profiling based on religion and ethnicity should be considered an effective counterterrorism strategy.

4.1 The paradigm of prevention's categorization of risky identities

Several scholars of criminal law are pointing out that we are currently undergoing a paradigmatic shift from a post- to a pre-crime society. The former employs a retrospective focus where prosecution and punishment of committed crimes are at the central, while in the prospective focus of the latter, these objectives are replaced by an all-encompassing aim of identifying potential suspects and preventing future crime.¹¹⁷ In part, the preventive focus enables an expansion in the pre-emptive powers of the police, both in terms of the measures that might be employed and on what grounds of suspicion. As noted in chapter 1, the proactive disposition of the law arguably serves as an important indication of this paradigmatic shift.

The paradigm of prevention is premised on the idea that anticipatory action is essential for effectively managing potential risks.¹¹⁸ Consequently, an imperative aspect of pre-emptive politics is the precautionary principle. Originally adopted in the field of environmental law, the principle demands the recognition that with a heightened level of threats against national security, not knowing specifically what the enemy looks like or how the threat will materialize is nonetheless no excuse for inaction.¹¹⁹ The focus on prevention is thus not

¹¹⁷ Janus 2004: 1; Zedner 2007: 262; Lomell 2012: 84.

¹¹⁸ NOU 2003:21 p. 29.

¹¹⁹ Lomell 2012: 93.

employed solely because it is deemed appropriate, but because it is considered highly necessary.¹²⁰

This preventive focus arguably contributes to a tendency where the fear of pursuing false positives is substituted by the fear of not identifying the false negatives.¹²¹ This logic arguably inverts the rationale epitomised in the traditional principle that it is better to have ten criminals go free than to have a single innocent individual punished. It could further be argued that this is premised on the securitized line of reasoning conveying that providing a potential suspect with the benefit of the doubt may result in risking the lives of innocent individuals.¹²² Furthermore, in opposition to having the State prove a person's guilt, the alleged suspects are increasingly expected to prove their innocence and ensure their continuous benign behaviour.¹²³ As evident with the criminalization of preparatory acts of terrorism, a person suspected of *potentially* being a future perpetrator will as a result be presumed guilty of the uncommitted crime, in order to protect the *potential* victims against irreparable harm.

Against this background, it is imperative to examine how the lack of a specifically identified threat, alongside the prevalence of the precautionary principle, leads to the categorization of individuals on basis of prevalent threat assessments. Given the limited resources of the Police Security Service, it will necessarily have to be selective when deciding who is considered necessary to collect and treat information about. A central question for inquiry is thus whether the pre-emptive strategy applied by the Police Security Service is based on a prediction of threats that uses ethnicity and religion as proxies for risk in order to identify possible perpetrators, thereby assigning individuals with a particular ethnic origin or religious belief with risky identities. The following section will examine the legal framework that regulates the use of pre-emptive surveillance measures by the

¹²⁰ Van Brakel & De Hert 2011 p. 166; Lehto 2009 p. xxxiii.

¹²¹ False positives denote the identification of innocent people as suspects, whereas false negatives entail *not* identifying actual terrorists. See e.g. Brown & Korff 2009 p. 125.

¹²² Pap 2012 p. 158.

¹²³ Aradau and van Munster 2008 p. 31.

Police Security Service and assess how the aforementioned questions are manifested in the information gathering of the Service.

4.2 Legal framework on preventive surveillance in Norway

4.2.1 The scope of application of pre-emptive surveillance powers

The rules pertaining to the information gathering of the Police Security Service is regulated on basis of the purpose of the collection, distinguishing between preventive and investigative purposes. Whereas the distinction between preventive and investigative purposes are clearer in relation to other branches of the police authorities in Norway, most of the work of the Police Security Service can be designated as preventive, even when it concerns investigations.¹²⁴

The tasks and responsibilities of the Police Security Service are stipulated in Chapter IIIa, Section 17b and c of the Police Act.¹²⁵ Section 17b paragraph 5 of the Police Act states that the Police Security Service shall prevent and investigate sabotage and politically motivated violence or coercion, or violations of Sections 147a, 147b and 147c of the General Civil Penal Code, which are the provisions pertaining to acts of terrorism and terrorism-related offenses.¹²⁶ It is the Service's preventive tasks that are most crucial for countering national security threats. The Police Security Service is the only agency of the Police authorized to collect and treat information about persons for preventive purposes, by placing individuals that have not committed any criminal act under surveillance.¹²⁷

This entails that in a preliminary mapping phase, the Police Security Service has broad authority to conduct information gathering for preventive purposes without satisfying any other criterion than that it has to be considered relevant for its tasks, pursuant to Section 17b of the Police Act. In practice, when the Police Security Service collects information for

¹²⁴ Sælør 2010 p. 287.

¹²⁵ Police Act.

¹²⁶ Police Act Section 17b para 5.

¹²⁷ For definition of "treatment" see the Police Registry Act para 2(2).

preventive purposes, it will subsequently undergo an assessment over whether the information should be stored; recorded in their working register;¹²⁸ as material constituting the basis for initiating a preventive case; or for an investigative case.¹²⁹

The Police Security Service has a range of different methods at their disposal for pre-emptive information gathering. The methods continuum include those measures that are not written in law such as the use of open sources or by means of covert coercive measures that requires a judicial order. For preventive purposes, covert coercive measures can be authorized if the Police Security Service considers there to be “*reasons to examine*” whether someone is preparing a criminal offense that the Service is mandated to prevent.¹³⁰ If the Police Security Service initiates an investigative case, employment of covert coercive measures can be authorized if satisfying the threshold “*reasonable grounds to believe*”, as stipulated in the Criminal Procedures Act.¹³¹ Certain covert coercive measures such as the use of audio surveillance may only be used in investigative cases, as it is deemed to be an overly intrusive measure employed for preventive purposes. The use of covert coercive measures shall only be applied in cases where other methods of collecting information are deemed insufficient and when such surveillance is considered to provide information of major importance for the case.¹³²

In 2009 the Methods Evaluation Committee considered the extent to which the Police Secret Service employs covert coercive measures for preventive purposes as modest.¹³³ However, the EOS Committee¹³⁴ has over the last years in their unclassified annual reports

¹²⁸ For definition of “registered” see the Police Registry Act para 2(6).

¹²⁹ A preventive case denotes a case that is initiated with the purpose of investigating whether someone is preparing a criminal offense that the Police Security Service is mandated to prevent and is separately defined from investigative cases, pursuant to the Police Registry Regulation para 21-5.

¹³⁰ Police Act para 17d, pursuant to the Criminal Procedures Act chapter 16 listing the covert coercive measures available.

¹³¹ Criminal Procedures Act para 222d.

¹³² Ot.prp. nr 60 (2004-2005) p. 96.

¹³³ NOU 2009:15 p. 126.

¹³⁴ The EOS Committee is the body mandated with the external and independent control of the Norwegian secret services, pursuant to the Act relating to the Oversight of Secret Services (1995).

emphasized that there has been an increase in their application for preventive purposes.¹³⁵ This tendency has led commentators to question whether the Police Security Service's utilization of covert coercive measures is incompatible with the requirement that such measures should primarily be applied for investigative purposes and that the Service accordingly interprets the stipulated conditions too broadly.¹³⁶

4.2.2 Legal limitations on the treatment of collected information

The following section will examine the rules pertaining to the treatment of collected information by the Police Security Service, furthermore, how the applicable criteria relates to information gathering on basis of a person's religious belief and ethnicity. A special report¹³⁷ issued to the Parliament by the EOS Committee in 2013 (hereinafter, 2013 special report) on the surveillance of two Muslim communities in Norway over a time period of ten years, will constitute the analytical parameter for the ensuing discussion, as the report arguably provides valuable and rare empirical insight into the pre-emptive surveillance practices of the Police Security Service. Furthermore, the findings in the report is considered imperative for substantiating the thesis' hypothesis that pre-emptive counterterrorism surveillance is premised on a prediction of future national security threats that uses ethnicity and religion as proxies for risk.

The treatment of information collected by the Police Security Service is subject to three cumulative criteria. It must have a defined purpose; be necessary; and be of certain quality. Assessments pertaining to the criteria will be contingent on the situation at hand, for instance affected by the scope and intrusiveness of the method employed for collecting information. The conditions reflect the need to ensure predictability and supervision, as elaborated upon in the Police Registry Regulation.¹³⁸ Furthermore, paragraph 21-3 of the

¹³⁵ EOS Committee annual reports 2011 p. 13; 2012 p. 11.

¹³⁶ Bruce & Haugland 2014 p. 76

¹³⁷ "Special report to the Parliament from the EOS Committee: The Police Security Service's registration of persons associated with two Muslim communities" 2013 (unofficial translation).

¹³⁸ Police Registry Regulation para 5-1; 5-2; 20-2; 21-1. The regulation is established by law pursuant to the Police Registry Act.

Police Registry Regulation lists permitted characteristics upon which information may be recorded and treated, excluding religious or ethnicity unless strictly necessary.¹³⁹

4.2.2.1 The criterion of defined purpose

The purpose for the treatment of information is, as stipulated in the Police Registry Regulation paragraph 20-2, to realize the responsibilities and tasks of the Police Security Service. The Service can only treat information in accordance with the purpose upon which it has been collected; furthermore, the purpose underpinning the collected information shall always be specified, both outside of and in preventive cases.¹⁴⁰ It thus follows, that the specified purpose for the collected information will be instrumental for determining the criteria of necessity and relevance.

As noted in the 2013 special report, central to the Police Security Service's work on counterterrorism is to monitor persons or communities in Norway that has the potential to impair the State's national security through violent means.¹⁴¹ Pursuant to the aim of protecting national security, the Service is afforded broad discretionary judgment to determine who are considered imperative to collect information about. However, the purpose for the collected information must be correlated to an assumption about a person or community's acceptance of using violence as a measure for realizing its aims. It thus follows that the religious, political or ideological convictions of an object placed under surveillance should be considered immaterial, unless coupled with a violent intent.

4.2.2.2 The criterion of necessity

The criterion of necessity is closely connected to the defined purpose. The Police Security Service can only treat information that is necessary for the purposes listed in the Police Registry Regulation paragraph 20-2. Additionally, paragraph 21-1 stipulates that in preventive cases the information used must have an objective connection to the respective

¹³⁹ Police Registry Regulation para 21-3.

¹⁴⁰ Police Registry Regulation para 20-2.

¹⁴¹ EOS Committee Special Report 2013 p. 7.

case, whereas general registrations shall be treated on a basis of necessity for the work of the Police Security Service.¹⁴² In the *travaux préparatoires* to the Police Registry Act, it is stated that the necessity requirement should be interpreted to include two criteria of probability and objective justification. Firstly, there must be a certain level of probability for the preparation or planning of a criminal act. The probability assessment must be based on certain objective indications and it should in principle be required that the act sought prevented is not a remote possibility. This requirement is, however, subject to modification on basis of a proportionality assessment of the measures employed. Secondly, the use of information for preventive purposes must have an objective justification.¹⁴³ In relation to the treatment of information outside of a preventive case, the necessity criterion requires considerations over the information's relevance for the purpose sought and prevailing threat assessments.¹⁴⁴

The necessity requirement arguably raises imperative questions about what sort of information it is considered necessary to collect material about. In the 2013 special report, the EOS Committee notes that the initial premise is that it should not be considered necessary to collect information about a person simply because he or she is of a certain ethnic origin or has a particular religious belief.¹⁴⁵ Up until 2014, the directive regulating the Police Security Service included a provision that prohibited treatment of information solely on basis of an individual's ethnicity or religious conviction.¹⁴⁶ However, with the enactment of the Police Registry Act, this prohibition was repealed. The Police Security Service is now authorized to record information on the aforementioned grounds, provided that it is *strictly* necessary in relation to the purpose of the treatment.¹⁴⁷ The Police Registry Regulation explicates that such treatment may be deemed necessary in situations where the

¹⁴² Police Registry Regulation para 21-1.

¹⁴³ Ot.prp.nr 108 (2008-2009) p. 272.

¹⁴⁴ Ot.prp.nr 108 (2008-2009) p. 272.

¹⁴⁵ EOS Committee Special Report 2013 p. 9.

¹⁴⁶ Police Security Service Directive, para 15 (section 12-16 was repealed 1 July 2014, pursuant to resolution of 27 September 2013 No. 1139). The list of prohibited grounds also included national origin, political or philosophical conviction, trade union affiliation, health and sexual-related details.

¹⁴⁷ Police Registry Act para 7.

information is considered to be of vital importance to why or how a particular criminal act is expected to be committed or when the purpose of the treatment cannot be achieved without it.¹⁴⁸

The *travaux préparatoires* to the Police Registry Act presupposes that such information will never constitute the *basis* for treatment.¹⁴⁹ However, the 2013 special report shows that the Police Security Service registered information about a number of individuals solely on basis of being their religion,¹⁵⁰ furthermore, that information about individuals' religious beliefs had in numerous instances been collected and treated in a manner that did not satisfy the necessity criterion, as it could not be sufficiently established that the treatment of the collected information contributed to the purpose of the surveillance.¹⁵¹ Additionally, the EOS Committee states that in several instances it could not be established that the registrations on religious beliefs had contributed to determining the respective individuals' potential or probability of using violence.¹⁵²

4.2.2.3 The criterion of quality

The criterion of quality includes four sub-tests that aim to ensure the adequacy, relevance, correctness and updated nature of the information collected.¹⁵³ The information must have a close connection to the purpose of the collected information; furthermore, if the information can be obtained by treating fewer and less sensitive details, this procedure shall be used.¹⁵⁴ Most importantly for the present discussion is arguably the criterion of relevance. When should information about a person's ethnicity or religious beliefs be considered relevant for pre-emptive surveillance purposes?

¹⁴⁸ Police Registry Regulation para 5-3.

¹⁴⁹ Ot.prp.nr 108 (2008-2009) p. 297.

¹⁵⁰ EOS Committee Special Report 2013 p. 7.

¹⁵¹ EOS Committee Special Report 2013 p. 14.

¹⁵² EOS Committee Special Report 2013 p. 20.

¹⁵³ Police Registry Regulation para 5-1 and 5-2.

¹⁵⁴ Police Registry Regulation para 5-1.

If it can be established with concrete and reliable evidence that an individual or community advocates or has the potential for religiously motivated violence, it would indeed be justified for the Police Security Service to place such individuals or communities under surveillance. However, when evaluating whether individuals that are *associated* with such persons or groups should be monitored, it arguably raises imperative questions about how peripheral such associations can be, particularly if the consideration of suspicion is founded on basis of personal characteristics such as ethnic origin or religious belief.

The EOS Committee states that in situations where the potential for violence is uncertain or unresolved, surveillance must be limited, as any random association with the particular community cannot be considered relevant for the purpose.¹⁵⁵ However, the 2013 special report shows that despite the aforementioned restrictions, the Police Security Service has treated information about, for instance, the two Muslim communities' religious leaders, their positions, their money transfers and religious education lessons, which included information about individuals considered too peripheral, thus leading to the conclusion that it could not be sufficiently established that the treatment of information was necessary nor relevant. In relation to one of the two Muslim communities, the Police Security Service even communicated to the EOS Committee that the surveillance had conceivably been conducted for an excessive time period.¹⁵⁶

While such hindsight could be seen to suggest that the Police Security Service expectantly will correct its errors in future cases, the violations of the applicable rules should arguably give raise to great concern, particularly since the practices to a considerable extent has violated the requirement that information about a person's religious belief should only be collected if considered strictly necessary. If this provision is disregarded, the strict necessity-requirement will arguably be void of any protective scope. The 2013 special

¹⁵⁵ EOS Committee Special Report 2013 p. 15.

¹⁵⁶ EOS Committee Special Report 2013 p. 16.

report clearly demonstrates that the Police Security Service has failed to adhere to this injunction.

Lastly, it is important to note that while the three conditions of purpose, necessity and relevance regulates the treatment of information for preventive purposes, the Police Registry Act enables the Police Security Service to store information for preventive purposes in four months without subjecting the information to the above conditions, in order to assess whether the information meets these criteria.¹⁵⁷ The information collected shall be evaluated against the three criteria as soon as possible. However, if the information is collected on basis of suspicion raised by the ethnic origin or religious beliefs of certain individuals, thus potentially generating a large pool of false positives, one might question whether such storage of data can be justified. The malpractice evidenced above arguably constitutes a considerable impediment to the privacy rights of the individuals concerned and may, as will be examined in chapter 5, constitute instances of indirect discrimination.

4.3 Identifying risk on basis of religion or ethnicity – an effective strategy?

The term “*enemy images*” has been adopted by Mathiesen as a description of how the State’s surveillance practices are geared towards specific threats to national security.¹⁵⁸ Following the terrorist attacks on 11 September 2001, Islamic terrorism has increasingly been encompassed into this enemy image and manifested as the predominant terrorism threat in the contemporary security realm.¹⁵⁹ In Norway, the Police Security Service has maintained that extreme Islamism constitutes the greatest threat to national security. This reality was upheld following the terrorist attacks on 22 July 2011, which was committed by far-right extremist Anders Behring Breivik, and has been reiterated in the Service’s annual unclassified threat assessments.¹⁶⁰

¹⁵⁷ Police Registry Act para 65; see also Police Registry Regulation para 5-4.

¹⁵⁸ Mathiesen 2013 p. 62.

¹⁵⁹ Jackson 2007 p. 395.

¹⁶⁰ See PST annual threat assessments; Bjørnland 2014 p. 34; NRK 27.09.11: “*Police Security Service: Islamic terror is the greatest threat to Norway*”.

Accordingly, one can safely assume that the dominant focus of the Police Secret Service is towards persons that may be associated with this particular threat. While such systematization of strategic knowledge is a necessary and appropriate way of working to effectively counter potential threats, it nonetheless raises the question of whether it leads to a threat categorization that, when applied, fuses predictive identifications of potential terrorists with other innocent individuals, as they have common characteristics such as religion or ethnicity. While the classified nature of factual threat predictions makes it is empirically unfeasible to effectively verify or falsify this claim, it is arguably necessary to examine whether the particular focus on extreme Islamism in Norway corresponds with a broader assessment of terrorism threats internationally.

As pointed out by Mathiesen, examination of the Europol's EU Terrorism Situation and Trend Report (TE-SAT) over the last years show that a notable minority of the unsuccessful, prevented and successful terrorist attacks in EU States were carried out by Islamist groups.¹⁶¹ The latest issued report covering 2013 confirms this trend, by stating "*as in previous years, the majority of attacks can be attributed to separatist terrorism*" denoting left-wing and anarchist terrorism, furthermore, "*EU Member States did not report any terrorist attacks specifically classified as (...) religiously inspired terrorism for the period of 2013*".¹⁶² The report does recognize that religious extremism "*appears to be evident*"¹⁶³ and that there has been an increase in arrests for recruitment and travelling for terrorist purposes to conflict zones, particularly emphasizing the protracted conflict in Syria.¹⁶⁴

While the illustration above is not intended to unreservedly question the actual threat faced by Islamic terrorism to the national security of Norway, one might nonetheless use the outlined tendency to inquire whether the focus on an individual's religious belief and

¹⁶¹ Mathiesen 2013 p. 72.

¹⁶² TE-SAT report 2014 p. 11.

¹⁶³ TE-SAT report 2014 p. 11.

¹⁶⁴ TE-SAT report 2014 p. 21.

affiliation with Islam constituting influential variables for identifying potential targets for pre-emptive surveillance should be considered suitable. Any assessment of the proportionality of an interference with an individual's privacy and right not to be unjustly discriminated against on basis of suspect grounds such as religion necessitates, in part, that the interference is effective in realizing the aim sought. This entails that the manner in which the Police Security Service adopts pre-emptive information gathering must be considered to effectively satisfy the purpose of the surveillance. Should information be gathered about individuals that are deemed worrisome or suspicious, in which their religious affiliation constitutes an important variable for identifying them as such, it has to be established that this will in fact effectively contribute to the defined purpose. There is, however, considerable evidence to suggest that predictive risk profiling on basis of a person's ethnicity or religious belief should be considered ineffective for preventive purposes.

4.4 The use of predictive terrorist profiling

Predictive profiling has become a much-used and much-debated law enforcement method of the counterterrorism paradigm.¹⁶⁵ Profiling can be *descriptive*, used to identify particular persons likely to have committed a criminal act based on explanatory variables and forensic evidence, or it may be *predictive*, signalling that it is developed so as to identify terrorists behind crimes that have not yet been committed.¹⁶⁶ A profile will thus encompass a range of various factors that constitute generalizations about certain groups of people. Should one of these constituting factors be race, religion or ethnicity; racial or ethnic profiling takes place. While the use of such characteristics certainly may be legitimate and appropriate for descriptive profiling, it is arguably much more problematic when applied for predictive purposes, especially when applied in the absence of concrete circumstantial intelligence. The Police Security Service is, as illustrated above, prevented from exclusively collecting

¹⁶⁵ The UN has defined terrorist profiling as "a set of physical, psychological, or behavioural variables, which have been identified as typical of persons involved in terrorist activities and which may have some predictive value in that respect", UN Doc A/HRC/4/26 para 32.

¹⁶⁶ Harris 2002 p. 11.

information about a person's ethnicity or religious belief unless it is considered strictly necessary,¹⁶⁷ As established above, there are however, reasons to question the compliance with this rule. One of the fundamental deficiencies with the use of predictive profiling is arguably that it creates predictions that are not based on verified facts and statistical data, but rather on unreliable and inaccurate assumptions about certain groups deemed to be of particular risk. Furthermore, such generalisations will necessarily create a high rate of false positives.

It has been argued that the use of predictive profiling for counterterror purposes is in part an effective way of identifying so-called terrorist "sleepers", denoting individuals who "*do not fit any specific behavioural or psychological pattern, whose very existence is only assumed*".¹⁶⁸ Consequently, given that "sleepers" typically are hard to identify on basis of their behaviour, personal characteristics become vital. Moeckli demonstrates how the controversial *Rasterfahndung* programme was applied in Germany following the 11 September 2001 events; a method entailing the screening of vast amounts of personal statistical data to identify potential terrorists on basis of predictive profiling. A unified profile was adopted consisting of the following factors: "*Male; age 18-40; current or former student; Muslim denomination; born in, or national of, one of several specified countries with a predominantly Muslim population.*"¹⁶⁹ Data from approximately 8 million people were processed, of which 32 000 matched the above criteria. It did not result in exposing any sleepers, or in any prosecution of terrorism-related offenses, thus arguably serving as indications of the ineffectiveness of predictive profiling.¹⁷⁰ The Federal Constitutional Court of Germany declared the programme unconstitutional in 2006, stating that preventive data screening violated the fundamental right of informational self-determination.¹⁷¹

¹⁶⁷ Police Registry Act para 7.

¹⁶⁸ Moeckli 2010 p. 102.

¹⁶⁹ Moeckli 2010 p. 103 citing Kant 2005 p. 13.

¹⁷⁰ Kett-Straub 2006 p. 971.

¹⁷¹ Kett-Straub 2006 p. 967.

The above example arguably accentuates the fallacy of employing predictive profiles for counterterrorism purposes, furthermore, demonstrating the increased relevance of individual characteristics in the effort to identify potential terrorists.¹⁷² Martin Scheinin, UN Special Rapporteur on counterterrorism and human rights, has asserted that evidence suggests that profiling based on ethnicity or religion are unsuitable and ineffective for countering terrorism, furthermore, warning about the «*profound emotional toll*» it can have on the large amount of innocent individuals that are subjected to it.¹⁷³ Against this background, it could be argued that the use of predictive profiling, as exemplified by using ethnicity and religion as proxies for risk, should raise notable concerns over whether it would be considered suitable and effective means in a proportionality assessment over the differential treatment generated by pre-emptive surveillance measures.

4.5 Conclusive remarks

This chapter has outlined the emergence of the paradigm of prevention and sought to demonstrate how its objective of identifying and preventing future crime has led to a categorization of individuals seen to inhabit risky identities, where a person's ethnic origin or religious beliefs constitute proxies for risk. The information inferred from the EOS Committee's special report to the parliament arguably serves as empirical evidence to substantiate the thesis' hypothesis. The suitability and effectiveness of using predictive terrorist profiling has been rebutted, thus accentuating that such identification should be considered to constitute a notable challenge to the protection afforded by the right to non-discrimination.

The following chapter will examine how the categorization of risky identities on basis of religion and ethnicity has the capacity to generate suspect communities. It will examine whether the disproportional effects that pre-emptive surveillance measures may have on such groups of risky identities, which share common characteristics such as religion or

¹⁷² Galli 2012 p. 168.

¹⁷³ UN Statement by Special Rapporteur Martin Scheinin 2007 p. 4.

ethnicity, could be seen to constitute instances of indirect discrimination. Lastly, it will assess whether the creation of suspect communities can foster counterproductive effects that restrain the State in the implementation of its counterterrorism objectives.

5 The creation of suspect communities

The preceding analysis has accentuated that an imperative aspect of the employment of pre-emptive surveillance measures for counterterrorism purposes is the identification of religion and ethnicity as proxies for risk in order to identify potential perpetrators. This invites the question of whether particular sub-groups in society that share such religious beliefs or ethnic origin are more easily categorized as a group deemed to be more suspicious than others. If so, is it accurate to describe them as constituting a suspect community? Furthermore, what could the potential harms inflicted by such categorization be and should the disproportionate effects that pre-emptive surveillance measures may have on these groups be considered as forms of indirect discrimination?

5.1 The suspect community thesis

Experiences in the United Kingdom on the application of counterterrorism legislation and the far-reaching police powers these laws have permitted,¹⁷⁴ has led to a debate over whether it is correct to identify British Muslims as constituting a “suspect community”.¹⁷⁵ Breen-Smyth argues that the contemporary initiation of viewing Muslims as part of a «*global suspect community*» came in the wake of 11 September 2001 and the Bush administration’s allegation of the «axis of evil».¹⁷⁶ As additional proponents of this view, Pantazis and Pemberton define a suspect community to signify a “*sub-group of the population that is singled out for state attention as being ‘problematic’*”.¹⁷⁷ Those arguing in favour of the suspect community thesis contend that counterterrorism legislation has been applied in a discriminatory manner, leaving Muslims disproportionately encumbered

¹⁷⁴ Section 44 and 45 of the UK Terrorism Act (2000) authorizes powers of stop and search. For examples of disproportionate applications of these powers, see e.g. Kundani 2006 who demonstrates that stop and search statistics in the United Kingdom in 2002-2003 indicate that black and Asian individuals were both four times more likely to be stopped than white individuals.

¹⁷⁵ The term “*suspect community*” was coined by Paddy Hillyard (1993) in relation to the effects of the 1974 Prevention of Terrorism Act on the Irish population in Britain.

¹⁷⁶ Breen-Smyth 2013 p. 229.

¹⁷⁷ Pantazis and Pemberton 2009 p. 649.

by the implemented measures, notwithstanding the fact that politicians have been eager to accent extreme Islamists as distinctly separated from the majority Muslim population.¹⁷⁸

Contrary to this view, others have dismissed the entire thesis as misplaced, as there is no empirical evidence to suggest that the enacted counterterrorism law has placed all – nor a majority – of Muslims in the United Kingdom under official State suspicion. Greer argues that it is erroneous to regard British Muslims as a suspect community, primarily on basis of the claim that Muslims are not a monolithic group and can thus not be designated as a “community”.¹⁷⁹ Furthermore, he notes “*there can be no question that the current terrorist threat is Islamist by nature rather than merely an result of official labelling*”.¹⁸⁰

One might arguably infer from the comprehensive research carried out on the discriminatory effects of the stop and search measures employed in the United Kingdom that the police authorities worked on particular assumptions about the physical appearance of potential terrorist threats.¹⁸¹ However, if a group of people were pre-selected as strategically more relevant for observation and information gathering, on basis of characteristics shared by a large amount of people, this would presumably entail that a great share of the pre-selected group was placed under surveillance without actually constituting a threat, but by fitting a particular threat pattern. This aspect is often highlighted as an unfortunate, but inevitable aspect of counterterrorism surveillance, namely that in the search for terrorists, innocent people may be affected.

However, while individuals do not enjoy protection against suspicion by the State, one could nonetheless question the broader implications such identification has on certain sub-groups of society. If the suspicion is systematized and applied accordingly towards particular groups on basis of their risky identities, one could call into question whether such

¹⁷⁸ See e.g. Nguyen 2005; Hickman et.al. 2010; Choudhury & Fenwick 2011; Pantazis & Pemberton 2009; 2011.

¹⁷⁹ Greer 2010 p. 1172.

¹⁸⁰ Greer 2010 p. 1157.

¹⁸¹ See e.g. Ameli et.al. 2004; Bowling & Phillips 2007; Kundani 2009.

practices would be deemed legitimate given that a sub-group of society is disproportionately encumbered by such a policy.

Greer asserts that in the *Ireland v. United Kingdom* case, the ECtHR ruled that if a threat to the national security of the State originates from a specified minority, disproportionate effects on this group do not necessarily mean that it would constitute a violation of the right to non-discrimination.¹⁸² Against this background, he argues that under the current situation of confronting Islamic terrorism, some Muslims will inevitably fall under official suspicion. However, he invalidates the claim that all Muslims in the United Kingdom have been placed under official suspicion, as being subject to stigmatization or Islamophobia cannot be considered as equivalent to being a formal suspect. Furthermore, Greer notes that such practice nonetheless would be objectionable from a human rights perspective only “*if it is groundless and leads to adverse consequences for those concerned or if it leads to consequences that cannot be defended by reference to whatever grounds they are.*”¹⁸³

5.1.1 Indications of harm inflicted by membership in suspect communities

If accepting Greer’s argument outlined above, one would nevertheless have to assess whether there are in fact adverse consequences generated for those individuals or specific groups that are placed under suspicion by the State, and the ensuing harm inflicted by being designated as a member of suspect communities. This could obviously only be done on a case-by-case basis. However, research has been conducted on the general impact the overt counterterrorism measures applied in the United Kingdom has had on Muslim communities, which suggests that the adverse consequences referred to by Greer has in fact materialized.

While noting the varied experience among the participants, research conducted by Choudhury and Fenwick on the impact of counterterrorism measures on Muslim

¹⁸² Ireland v. United Kingdom (1978) para 225-232.

¹⁸³ Greer 2010 p. 1186.

communities show that counterterrorism law and policies are experienced “*more intensely, acutely and directly*” by Muslims, in comparison to the non-Muslims interviewed, moreover, that the experiences imply that the two groups live “*parallel lives*”.¹⁸⁴ Furthermore, the researchers contend that there was a “*damaging disconnect between the state and communities in their conceptions of ‘threat’*”, leading them to assert that British Muslims’ experiences of counterterrorism laws contribute to the feeling of being part of a suspect community and that “*they are targeted by authorities simply because of their religion*”.¹⁸⁵

Choudry and Fenwick’s findings are substantiated in a similar study on British Muslims’ encounters with counterterrorism policies, where it is accentuated that the Muslim respondents’ experiences led to a «*state of fearfulness*». ¹⁸⁶ In practice, this fear was manifested by for instance refraining from discussing politics at work, evading certain urban areas, being cautious over the topics that one could talk about on the telephone and Internet, or «*taking care not to mention al-Qaeda or terrorism, even in jokes*». ¹⁸⁷ Furthermore, the discursive portrayal by politicians, law enforcement authorities and the media of the Muslim community as a «*two-faced Janus*», where law-abiding Muslims tend to be discussed in relation to Islamic extremists, contributed significantly to the subjective feeling of belonging to a suspect community. ¹⁸⁸

While not conducted in relation to the counterterrorism context or Muslims exclusively, empirical research carried out in Norway on ethnic minorities’ encounters with the police, primarily on basis of stop and search practices, in part shows that the manner in which these individuals are repeatedly stopped has given them the feeling of being subjected to racial discrimination. ¹⁸⁹ Central to this perception is the absence of a definite purpose for

¹⁸⁴ Choudhury & Fenwick 2011 p. 85.

¹⁸⁵ Choudhury & Fenwick 2011 p. v, 87.

¹⁸⁶ Hickman et al. 2011 p. 20.

¹⁸⁷ Hickman et al. 2011 p. 20.

¹⁸⁸ Hickman et al. 2011 p. 24.

¹⁸⁹ Sollund 2007 p. 232.

the stop by the police, which is thus seen to imply that they are selected based on generalizations concerning their ethnicity, physical appearance or geographical location. As might be expected, the lack of being provided with a specified explanation to why they are being stopped is seen as unreasonable. Based on the main findings of the research, Sollund argues that the police's threshold for identifying certain ethnic groups as suspicious is too low.¹⁹⁰ While asserting that this cannot be explained on basis of systemic racism in the police, it arguably raises important questions about the unintended consequences generated by police strategies that are based on notions of risky identities and particular communities that are identified as suspect.

It should be noted that the legality of the stop and search practices under Section 44 of the UK Terrorism Act (2000) was adjudicated before the ECtHR in the case of *Gillan & Quinton v. the United Kingdom* in 2010. The Court ruled that there had been a violation of the applicants' right to privacy, as the powers pursuant to Section 44 were not in accordance with the law, in view of the fact that they were not adequately circumscribed nor subject to adequate safeguards against abuse.¹⁹¹ However, more importantly for the present discussion; the Court stated that «*while the present case do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such persons is a very real consideration*».¹⁹² The judgment is arguably important as it demonstrates how the employment of counterterrorism measures on low grounds of suspicion, alongside the broad discretion afforded to police authorities, has the capacity to affect particular groups disproportionately and in a discriminatory manner.

5.1.2 Drawing correlations between overt and covert suspicion

Greer has in a recent article reiterated his assertion that no empirical evidence has been provided to substantiate the suspect community thesis outlined above. He maintains that if the line of argument is to be worthy of attention, “*credible evidence must be provided to*

¹⁹⁰ Sollund 2007 p. 231.

¹⁹¹ *Gillan & Quinton v. the United Kingdom* (2010) para 87.

¹⁹² *Gillan & Quinton v. the United Kingdom* (2010) para 85.

show that a substantial majority of [...] Muslims are under some form of official suspicion".¹⁹³ However, while it thus appears that Greer objects the validity and applicability of the above research findings, his asserted position arguably elucidates an imperative element inherent in any deliberation over the effects of implemented surveillance measures; who these are directed against; and the disproportionate and potentially discriminatory implications they may have.

Given the intrinsic confidentiality of whom pre-emptive surveillance measures are directed at, one will inevitably be denied the ability to effectively contradict Greer's contention, by convincingly demonstrating that suspect communities have in fact been created, as groups of individuals designated to inhabit risky identities are singled out as suspicious by the Police Security Service. While not seeking to negate the obvious necessity of classified intelligence, nor to refute the fact that extreme Islamists constitute actual threats to the national security of Norway, the confidentiality underpinning the conduct of the Service arguably serves to prevent the recognition that pre-emptive surveillance may be applied disproportionately, or even unlawfully, towards particular groups on basis of their personal characteristics. If illegitimately applied, this should arguably be seen to constitute a potential menace to individuals' ability to effectively seek a right to remedy in cases of wrongful application of pre-emptive surveillance measures, furthermore, towards a democratic and informed debate, precisely because of the citizenry's inability to rebut the assumptions that the practices rely upon.

While the research studies cited above have been chosen on basis of their reliability and scope, they are nonetheless singular empirical studies that cannot be applied with the conviction that they possess the whole truth about how Muslims constituting minority groups in Western States perceive pre-emptive counterterrorism measures. However, it would arguably be unwise to dismiss their utility and negate the implications they accentuate simply because they represent a comparatively small outlook, particularly

¹⁹³ Greer 2014 p. 471.

because the findings they provide and the concerns they voice are notably congruent. Cumulatively, they arguably serve as an important warning about the political and social repercussions that pre-emptive surveillance measures may have on those individuals that are seen to inhabit risky identities, thus forming suspect communities.

It could further be argued that the empirical evidence conducted in the United Kingdom is pertinent for consideration in the Norwegian context, as the Police Security Service has used the counterterrorism measures and legislation enacted in the United Kingdom as an example for replication in Norway. Engene rightfully notes that this has been done without any coinciding considerations over the effects the implemented counterterrorism measures has had in the United Kingdom.¹⁹⁴ Furthermore, while pertinent objections could be raised to the transferable nature of the research findings cited above given that these concern overt procedures, the observations made should nonetheless be seen as instructive on basis of the following factors: If Muslims experience counterterrorism measures to cumulatively contribute to the perception of being categorized as a suspect community, it is arguably likely that this perception would be equally manifested if the measures they were being subjected to were covert rather than overt. It could be argued that the perception of suspicion would be even greater, given that the use of covert coercive measures is considered to represent a particularly intrusive interference into an individual's right to privacy, as evidenced by the requirement that the use of such measures can only be authorized by a judicial order. If one were to become aware of the fact that one had been subjected to covert surveillance, there is arguably a high probability that a false positive would perceive such interference as particularly invasive if the primary reason for suspicion was grounded on the fact that one had a particular religious faith or ethnicity.

¹⁹⁴ Engene 2011 p. 241.

5.2 Are members of suspect communities subjected to indirect discrimination?

Lack of sufficient empirical data on the surveillance practices of the Police Secret Service in Norway prevents the present discussion from adopting evidence-based facts as the analytical parameters. However, building on the aforementioned premises about the ability to draw correlations between overt and covert suspicion, in addition to the instances of unlawful information gathering of the Police Security Service noted in chapter 4, it could arguably be demonstrated that individuals that are considered to inhabit risky identities on basis of their religious beliefs or ethnic origin are disproportionately affected by pre-emptive surveillance measures.

As established in chapter 3, indirect discrimination occurs when a neutral measure, such as the rules pertaining to the information gathering of the Police Security Service, disproportionately and negatively affect members of a particular group. It thus follows that when applying pre-emptive surveillance measures that are not premised on an intention to discriminate certain individuals or communities, but the effects generated by the measures themselves result in disadvantageous treatment, indirect discrimination may occur. In the light of the current threat situation, where extreme Islamism is considered as the paramount danger to the national security of Norway, one can safely assume that the Police Security Service will direct its efforts towards individuals or groups that are considered to be directly or indirectly associated with this enemy image.

Any consideration of factual instances of indirect discrimination could only be done on a case-by-case basis, necessitating a careful examination of the applicable facts. While not contending that all Norwegian Muslims represent one monolithic group, it could nevertheless be argued that it would be accurate to claim that Muslim communities in Norway are susceptible to being disproportionately affected by pre-emptive surveillance measures conducted by the Police Security Service. Where circumstantial evidence directs the pre-emptive surveillance of the Service and its identification of Muslim individuals as potential terrorists, such practices will be legitimate and in conformity with the right to

non-discrimination. However, if the ethnic origin or religion of an individual is the *decisive* factor for such surveillance measures, it could be argued that the objectivity underlying the implemented measure is highly questionable, making the test of objective justification increasingly harder to satisfy. Accordingly, such situations are arguably more likely to have the capacity to form the basis of a successful claim of indirect discrimination.

The concept of indirect discrimination recognizes that certain groups of people may be disparately impacted by neutral measures, thus seeking to ensure substantive equality. As noted by the ECtHR in the judgment of *Zarb Adami*, recognition must be given to the situation on the ground.¹⁹⁵ Accordingly, it is arguably vital to acknowledge the broader effects that pre-emptive surveillance measures can have on groups of individuals who perceive themselves to being disproportionately negatively affected as members of a suspect community. It could be argued that the probable apprehension ensuing from being designated as inhabiting a risky identity, has the capacity to hamper the enjoyment of other fundamental human rights such as freedom of expression and association as well as freedom of religion. The chilling effect that can be said to arise from the perception of being discriminated against, arguably accentuates the foundational character of the right to non-discrimination, as an indispensable guarantor for the fulfilment of other human rights.

5.3 The causality between perceived discrimination and radicalization

The respondents referred to in section 5.1.1 claiming to have been subjected to State suspicion on basis of their risky identities, were under the perception that they were being subjected to discrimination by the State. While perceived discrimination may not be equivalent to objective discrimination, it might nonetheless be an important factor to consider when assessing the overall efficiency of counterterrorism policies and the potential repercussions they may generate. One might further question whether such perceived feelings of discrimination on basis of a perceived or factual membership in a suspect community contribute to resentment against the State. The misidentification of

¹⁹⁵ *Zarb Adami v. Malta* 2006 para 76.

individuals as suspicious, on basis of their designation as possessing risky identities, may thus engender consequences that have long-term counterproductive effects for the Police Security Service.

A fundamental tenet of Norway's counterterrorism strategy is the prevention of radicalization.¹⁹⁶ The aforementioned research conducted on the disproportional effects counterterrorism measures has had on Muslims in the United Kingdom, shows that police cooperation with minority communities are challenged, as the misrecognition by the police leads to processes of alienation, that further engenders unwillingness to cooperate with the authorities.¹⁹⁷ This is arguably a problematic tendency, given that law enforcement authorities will be dependent on good community relations in order to effectively respond to terrorism threats, particularly in relation to the work on countering processes of radicalisation.

In a 2012 study, a quantitative analysis examined whether Muslims living in five Western States, who experienced or perceived anti-Muslim discrimination, were more likely to support suicide bombing.¹⁹⁸ The researchers concluded that Muslims' perceptions of anti-Muslim discrimination constituted a risk factor for such support,¹⁹⁹ furthermore, emphasizing how "*perceived discrimination among the diaspora population possibly enlarges the radicalized pool from which militants arise*".²⁰⁰ While the research referred to here accentuates that the correlation between perceived discrimination and support of suicide bombing was modest overall, it could nonetheless be suggested that subjective feelings of perceived discrimination may contribute to processes of radicalization.

Furthermore, a notable finding in much of the revised research conducted on the existence of suspect communities; is the emphasis on how State suspicion generates alienation and

¹⁹⁶ Meld.St. 21 (2012-2013) p. 23.

¹⁹⁷ See e.g. Kundani 2009; Pickering et al. 2008; Spalek 2011.

¹⁹⁸ Victoroff et al. 2012.

¹⁹⁹ Victoroff et al. 2012 p. 9.

²⁰⁰ Victoroff et al. 2012 p. 13.

perceptions of being ostracized from the majority community. Research conducted by Blackwood on the psychological effects of counterterrorism measures demonstrates how Muslims that have experienced instances of misrecognition on basis of their religious affiliation has led to the feeling of being seen as a “*disreputable and dangerous other*”, which has been considered to prevent effective inclusion into the society at large.²⁰¹ Accordingly, it could be argued that the use of pre-emptive surveillance and its inherent categorization of risky identities based on ethnic or religious affiliation has the capacity to generate perceived discrimination to the extent that it becomes counterproductive for the objectives sought realized in relation to countering radicalization. While the work of the Police Security Service in part concerns monitoring groups that are considered susceptible to radicalization, it could be argued that the means employed potentially has the opposite effect.

5.4 Conclusive remarks

The consequences of the application of pre-emptive surveillance measures towards groups considered to inhabit risky identities on basis of their religious faith or ethnic origin are manifold. At best, the measures may prevent instances of criminal terrorist acts that would induce irreparable harm. However, as sought established in the preceding analysis, their application may also have unintended consequences, where the measures disproportionately affect particular groups.

The chapter has attempted to demonstrate that the application of pre-emptive surveillance has the capacity to generate suspect communities, which may result in instances of indirect discrimination, as it is probable that it would be difficult for the State to sufficiently establish that the differential treatment generated has an objective and reasonable justification when founded on personal characteristics. It has been argued that the ramifications overt counterterrorism measures has on particular groups in society should be recognized as just as germane for the application of covert measures. Furthermore, such

²⁰¹ Blackwood 2013 p. 8.

measures may foster the development of alienation and resentment against the State, thereby precluding the Police Security Service's strategy to effectively counter processes of radicalization.

6 Conclusion

The scarcity of empirical evidence to substantiate the arguments proposed in this thesis prevents any definite conclusive answers. However, important observations can arguably be made on basis of the aforementioned analysis. Counterterrorism surveillance raises questions that are of central importance to the rule of law in a democratic State as Norway. This is particularly evident when such measures are applied pre-emptively. The contemporary advancement of proactive criminal law as a vital instrument in the global fight against terrorism has enabled an expansion in the scope of pre-emptive surveillance measures on low grounds of suspicion, thereby empowering the paradigm of prevention's all-encompassing aim of effectively managing potential risks that have yet to materialise into criminal acts.

A prevalent response to the heightened terrorist threat is the State's declared need to balance individual human rights with national security objectives. However, the underpinning distributive implications that such balancing involves is insufficiently accentuated, thus precluding the public recognition that national security policies inevitably involves choices about how subsequent restrictions on rights are to be allocated. This tendency is further evident in the discourse on the potential ramifications that counterterrorism surveillance can have on society, as it arguably tends to be discussed within a framework of privacy rights, where the assumption is that everyone will be equally affected by the limitations necessitated by an exacerbated security climate. The challenges that pre-emptive surveillance may have on the protection afforded by the fundamental right to non-discrimination are thus under-communicated and the prospect for an informed debate about the implementation of such measures is arguably curtailed.

An informed opinion about the effects of pre-emptive counterterrorism surveillance would acknowledge that the paradigm of prevention is premised on a prediction of future national security threats that uses ethnicity and religion as proxies for risk in order to identify potential terrorists. This thesis has argued and sought to demonstrate that this process

involves the designation of individuals with a particular religious belief or ethnic origin to inhabit risky identities, thus making them more easily subjected to pre-emptive surveillance measures. As the paramount threat to the national security of Norway is identified to emanate from extreme Islamism, Norwegian Muslims are as a result prone to become part of suspect communities, by virtue of their shared personal characteristics of religion or ethnicity. The disproportionate effects pre-emptive surveillance measures have on these groups could be seen to indicate that they are being subjected to instances of indirect discrimination. Additionally, as have been demonstrated, the disproportionate and discriminatory application of pre-emptive surveillance measures has the capacity to generate counterproductive corollaries that restrain the State in its efforts to effectively counter terrorism.

The outlined challenges that pre-emptive surveillance measures can have on the right to non-discrimination should alarm any State that seeks to protect and ensure the fundamental ideals that human rights are founded upon, namely to guarantee the human dignity and equal rights of everyone.

List of references

International treaties and statutes:

CAT	<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i> , adopted by the UN General Assembly, 10 December 1984
ECHR	<i>European Convention for the Protection of Human Rights and Fundamental Freedoms</i> , adopted by the Council of Europe, 4 November 1950
EU Framework Decision	<i>European Council Framework Decision 2002/475 on Combating Terrorism</i> , adopted by the Council of Europe, 13 June 2002
EU Terrorism Convention	<i>Convention on the Prevention of Terrorism</i> , adopted by the Council of Europe, 16 May 2005
Financing Convention	<i>International Convention for the Suppression of the Financing of Terrorism</i> , adopted by the UN General Assembly, 9 December 1999
ICCPR	<i>International Covenant on Civil and Political Rights</i> , adopted by the UN General Assembly, 16 December 1966
ICERD	<i>International Convention on the Elimination of All Forms of Racial Discrimination</i> , adopted by the UN General Assembly, 21 December 1965
Protocol 12 to the ECHR	<i>Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination</i> , adopted by the Council of Europe, 4 November 2000
S/RES/1373	Security Council resolution 1373 on threats to international peace and security caused by terrorist acts, S/RES/1373/, 28 September 2001
Statute of the ICJ	<i>Statute of the International Court of Justice</i> , adopted by the UN General Assembly, 18 April 1946

UDHR	<i>Universal Declaration on Human Rights</i> , adopted by the UN General Assembly, 10 December 1948
UK Terrorism Act	<i>United Kingdom: The Terrorism Act 2000</i> , 2000 Chapter 11, 20 July 2000
UN Charter	<i>Charter of the United Nations</i> , adopted by the UN General Assembly, 24 October 1945
VCLT	<i>Vienna Convention the Law of Treaties</i> , adopted by the United Nations, 23 May 1969

Norwegian laws and regulations:

Anti-Discrimination Act	LOV-2005-06-03-33 <i>Lov om forbud mot diskriminering på bakgrunn av etnisitet, religion og livssyn m.v. [Act on prohibition of discrimination based on ethnicity, religion, etc]</i>
Act relating to the Oversight of Secret Services	LOV-1995-02-03-7 <i>Lov om kontroll med etterretnings-, overvåkings- og sikkerhetstjeneste [Act relating to the Monitoring of Intelligence, Surveillance and Security Services]</i>
Criminal Procedure Act	LOV-1981-05-22 <i>Lov om rettergangsmåten i straffesaker [Act relating to legal procedure in criminal cases]</i>
Ethnic Anti-Discrimination Act	LOV-2013-06-21-60 <i>Lov om forbud mot diskriminering på bakgrunn av etnisitet, religion og livssyn [Act relating to a prohibition against discrimination on the basis of ethnicity, religion and belief]</i>
General Civil Penal Code	LOV-1902-05-22 <i>Almindelig borgerlig Straffelov [The General civil penal code]</i>
Human Rights Act	LOV-1999-05-21 <i>Lov om styrking av menneskerettighetenes stilling i norsk rett [Act relating to the strengthening of the status of human rights in Norwegian law]</i>
Norwegian Constitution	LOV-1814-05-17 <i>Kongeriket Norges Grunnlov [The Constitution of the Kingdom of Norway]</i>
Police Act	LOV-1995-08-04 <i>Politiloven [Act relating to the police]</i>

Police Registry Act	LOV-2010-05-28-16 <i>Lov om behandling av opplysninger i politiet og påtalemyndigheten [Act relating to the treatment of information by the police and the prosecuting authority]</i>
Police Registry Regulation	FOR-2013-09-20-1097 <i>Forskrift om behandling av opplysninger i politiet og påtalemyndigheten [Regulation relating to the treatment of information by the police and the prosecuting authority]</i>
Police Security Service Directive	FOR-2005-08-19-920 <i>Instruks for Politiets sikkerhetstjeneste [Police Security Service Directive]</i>
Provisional Decree on Terrorist Financing	LOV-2001-10-05-1134 <i>Provisorisk anordning om forbud mot finansiering av terrorisme m.m. [Provisional decree on the prohibition of terrorist financing etc]</i>

List of judgments:

The European Court of Human Rights:

Case of Abdulaziz, Calabes and Balkandali v. the United Kingdom (Application No. 9214/80; 9473/81; 9474/81). Judgment: Strasbourg 28 May 1985

Case of Angelova v. Bulgaria (Application No. 38361/97). Judgment: Strasbourg 13 June 2002

Belgian Linguistics Case: Case Relating to certain aspects of the law on the use of languages in Belgium v. Belgium (Application No. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64). Judgment: Strasbourg 23 July 1968

Case of Carson and Others v. the United Kingdom (Application No. 42184/05). Judgment: Strasbourg 16 March 2010

Case of D.H. and Others v. the Czech Republic (Application No. 57325/00). Judgment: Strasbourg 13 November 2007

Case of Emel Boyraz v. Turkey (Application No. 61960/08). Judgment: Strasbourg 2 March 2015

Case of Engel and Others v. the Netherlands (Application No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72). Judgment: Strasbourg 8 June 1976

Case of Gillan & Quinton v. the United Kingdom (Application No. 4158/05). Judgment: Strasbourg 12 January 2010

Case of Gogitidze and Others v. Georgia (Application No. 36862/05).
Judgment: Strasbourg 12 May 2015

Case of Grande Oriente d'Italia di Palazzo Giustiniani v. Italy (Application No. 35972/97).
Judgment: Strasbourg 2 August 2001

Case of Handyside v. the United Kingdom (Application No. 5493772).
Judgment: Strasbourg 7 December 1976

Case of Hoffman v. Austria (Application No. 12875/87).
Judgment: Strasbourg 23 June 1993

Case of Ireland v. the United Kingdom (Application No. 5310/71).
Judgment: Strasbourg 18 January 1978

Case of Khan v. Germany (Application No. 38030/12).
Judgment: Strasbourg 23 April 2015

Case of Kruslin v. France (Application No. 11801/85).
Judgment: Strasbourg 24 April 1990

Case of Leander v. Sweden (Application No. 9248/81).
Judgment: Strasbourg 26 March 1987

Case of Malone v. the United Kingdom (Application No. 8691/79).
Judgment: Strasbourg 2 August 1984

Case of Osman v. the United Kingdom (Application No. 87/1997/871/1083).
Judgment: Strasbourg 28 October 1998

Case of Rasmussen v Denmark (Application No. 8777/79).
Judgment: Strasbourg 28 November 1984

Case of Salman v. Turkey (Application No. 21986/93).
Judgment: Strasbourg 27 June 2000

Case of Sampanis and Others v. Greece (Application No. 59608/09).
Judgment: Strasbourg 11 December 2012

Case of Sporrang and Lönnroth v. Sweden (Application No. 7151/75/7152/75).
Judgment: Strasbourg 23 September 1982

Case of Timishev v. Russia (Application No. 55762/00; 55974/00).
Judgment: Strasbourg 13 December 2005

Case of Vojnity v. Hungary (Application No. 29617/06).
Judgment: Strasbourg 12 February 2013

Case of Zana v. Turkey (Application No. 69/1996/688/880).
Judgment: Strasbourg 25 November 1997

Case of Zarb Adami v. Malta (Application No. 17209/02).
Judgment: Strasbourg 20 June 2006

Official documents issued by UN and EU bodies:

A/HRC/4/26	UN General Assembly, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, 26 March 2007
CERD/C/GC/32	UN Committee on the Elimination of Racial Discrimination (CERD) General Recommendation No. 32, 24 September 2009
CERD/C/63/CO/11	UN Committee on the Elimination of Racial Discrimination (CERD), Concluding Observations, United Kingdom of Great Britain and Northern Ireland, 10 December 2003
Council of Europe Report 2013	Council of Europe, “ <i>National Security and European Case-Law</i> ”, European Court of Human Rights, Research Division 2013
E/C.12/GC/20	UN Committee on Economic, Social and Cultural Rights, General Comment No. 20, 2 July 2009
HRI/GEN/1/Rev.7	UN, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, 12 May 2004
HRI/GEN/1/Rev.9	UN, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, 29 January 2007
OHCHR Report 2004	UN Economic and Social Council, Analytical Study of the High Commissioner for Human Rights on the Fundamental Principle of Non-discrimination in the Context of Globalization, 15 January 2004

TE-SAT 2014

European Police Office, “*European Union Terrorism Situation and Trend Report 2014*”, Europol

UN Statement by Special Rapporteur M. Scheinin

UN, “Statement by Mr. Martin Scheinin, Special Rapporteur on the promotion and protection of human rights while countering terrorism”, Fourth Session of the Human Rights Council, 12-30 March 2007

Norwegian official documents:

EOS Committee annual report 2011

Årsmelding til Stortinget fra Stortingets kontrollutvalg for etterretnings-, overvåkings- og sikkerhetstjeneste. Dokument 7:1 (2011-2012), available at http://eos-utvalget.no/norsk/arasmeldinger/content/text_1401199471784/1401199478297/_2011.pdf, accessed January 14th, 2015

EOS Committee annual report 2012

Årsmelding til Stortinget fra Stortingets kontrollutvalg for etterretnings-, overvåkings- og sikkerhetstjeneste. Dokument 7:1 (2012-2013), available at http://eos-utvalget.no/norsk/arasmeldinger/content/text_1401199471784/1401199475088/m20122.pdf, accessed January 14th, 2015

EOS Committee annual report 2013

Årsmelding for 2013. Stortingets kontrollutvalg for etterretnings-, overvåkings- og sikkerhetstjeneste, available at http://eos-utvalget.no/norsk/arasmeldinger/content/text_1401199471784/1401199473537/m2013.pdf, accessed January 15th, 2015

EOS Committee Special Report 2013

Særskilt melding til Stortinget fra EOS-utvalget. PSTs registrering av personer tilknyttet to muslimske miljøer, available at http://eos-utvalget.no/norsk/saerskilte_meldinger/content_1/ext_1401199513555/1401199518417/sm2013.pdf, accessed January 5th, 2015

NOU 1993:3	<i>Strafferettslige regler i terroristbekjempelsen</i> , Ministry of Justice and Police, 11 February 1992
NOU 2003:21	<i>Kriminalitetsbekjempelse og personvern</i> , Ministry of Justice and Police, 28 August 2003
NOU 2009:14	<i>Et helhetlig diskrimineringsvern</i> , Ministry of Children and Equality, 19 June 2009
NOU 2009:15	<i>Skjult informasjon – åpen kontroll</i> , Ministry of Justice and Police, 15 February 2008
Meld.St.21 (2012-2013)	<i>Terrorberedskap</i> , Ministry of Justice and Public Security, 20 March 2013
Ot.prp.nr 8 (2007-2008)	<i>Om lov om endringer i straffeloven</i> , Ministry of Justice and Police, 9 November 2007
Ot.prp.nr 60 (2004-2005)	<i>Om lov om endringer i straffeprosessloven og politiloven</i> , Ministry of Justice and Police, 18 March 2005
Ot.prp.nr 108 (2008-2009)	<i>Om lov om behandling av opplysninger i politiet og påtalemyndigheten (politiregisterloven)</i> , Ministry of Justice and Police, 21 August 2009

Secondary literature:

- Alexy, R. (2002): *“A Theory of Constitutional Rights”*, Oxford University Press
- Ameli, S., Elahi, M., & Merali, A. (2004): *«Social Discrimination: Across the Muslim Divide»*, London: Islamic Human Rights Commission
- Andenæs, J. & Myhrer, T-G. (2009): *«Norsk straffeprosess»*, Oslo: Universitetsforlaget
- Aradau, C. & van Munster, R. (2008): *“Taming the Future. The Dispositif of Risk in the War on Terror”* in Amoore, L & de Goede, M., *Risk and the War on Terror*, Routledge
- Arnardóttir, O.M. (2003): *“Equality and Non-Discrimination under the European Convention on Human Rights”*, Martinus Nijhoff Publishers

Arnardóttir, O.M. (2014): “The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 ECHR”, *Human Rights Law Review*, Vol 14. No. 4, pp. 647-670

Barak, A. (2010): “*Proportionality and Principled Balancing*”, *Law & Ethics of Human Rights*, Vol. 4, No. 1

Barak, A. (2012): “*Proportionality. Constitutional Rights and their Limitations*”, Cambridge University Press

Barak-Erez, D. (2012): “*Distributive Justice in National Security Law*”, *Harvard National Security Journal*, Vol. 3, No. 2, pp. 283-308

Bayefski, A. (1990): «*The Principle of Equality and Non-Discrimination in International Law*», *Human Rights Journal*, Vol. 11, No. 1-2

Berry, S.E. (2011): “*Bringing Muslim Minorities within the International Convention on the Elimination of All Forms of Racial Discrimination – Square Peg in a Round Hole?*”, *Human Rights Law Review*, Vol. 11, No. 3, pp. 423-450

Bjørnland, B. (2014): “*Åpenhet og trygghet i de nordiske samfunn etter erfaring med terrorhandlinger*”, published in *Forhandlingene ved det 40. nordiske juristmøtet i Oslo* 21.-22. august 2014. Del 1, pp. 31-46

Blackwood, L., Hopkins, N., Reicher, S. (2013): “*Turning the Analytical Gaze on ‘Us’: The Role of Authorities in the Alienation of Minorities*”, *European Psychologist*, Vol. 18, No. 4, pp. 245-252

Blaker Strand, V. (2007): “*Vern mot direkte og indirekte diskriminering etter norsk rett – et ensartet vern?*”, *Lov og rett*, Vol. 45, No. 3, pp. 131-153

Bowling, B. & Phillips, C. (2007): «*Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search*», *The Modern Law Review Limited*, Vol. 70, No. 6, pp. 936-961

Breen-Smyth, M. (2013): “*Theorising the Suspect Community: Counter-terrorism, Security Practices and the Public Imagination*”, *Critical Studies on Terrorism*, Vol. 7, No. 2, pp. 223-240

Brems, E. & Lavrysen, L. (2015): “*Don’t Use a Seldgehammer to Crack a Nut: Less Restrictive Means in the Case Law of the European Court of Human Rights*”, *Human Rights Law Review*, Vol. 15, No. 1, pp. 139-168

Brown, I. & Korff, D. (2009): “*Terrorism and the Proportionality of Internet Surveillance*”, *European Journal of Criminology*, Vol. 6, No. 2, pp. 119-134

Bruce, I. & Haugland, S.G. (2014): «*Skjulte tvangsmidler*», Universitetsforlaget

Bruce, I. & Husabø, E.J. (2009): “*Fighting Terrorism through Multilevel Criminal Legislation*”, Martinus Nijhoff Publishers

Bygrave, L.A. (2010): «*Captain Surveillance v. Mr. X*» in Schartum, D.W. (ed), *Overvåking i en rettsstat*, Fagbokforlaget

Bårdsen, A. (2014): “*Equality and Non-discrimination – Reflections on Interpretation from a Norwegian Perspective*”, Second Judicial Forum, Mont Fleur 9 November 2014, available at <https://www.domstol.no/nn-NO/Enkelt-domstol/Noregs-Hogsterett/Artiklar-med-meir/Equality-and-non-discrimination--reflections-on-interpretation-from-a-Norwegian-perspective-Second-Judicial-Forum-Mont-Fleur--Stellenbosch-Sor-Afrika-9-november-2014/>, accessed February 6th, 2015

Christoffersen, J. (2009): “*Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*”, Martinus Nijhoff Publishers

Choudhury, T. & Fenwick, H. (2011): “*The Impact of Counter-terrorism Measures on Muslim Communities*”, Equality and Human Rights Commission Research report 72, available at http://www.equalityhumanrights.com/sites/default/files/documents/research/counter-terrorism_research_report_72.pdf, accessed February 12, 2015

Cohen, J. (1999): “*Habermas on Democracy*”, *Ratio Juris*, Vol. 12, No. 4, pp. 385-416

De la Rasilla del Moral, I. (2006) “*The Increasingly Marginal Appreciation of the Margin of Appreciation Doctrine*”, *German Law Journal*, Vol. 7, No. 6, pp. 611-624

de Schutter, O. (2011): “*The Prohibition of Discrimination under European Human Rights Law. Relevance for EU Racial and Employment Equality Directives*”, *European Communities*, available at http://ec.europa.eu/justice/discrimination/files/the_prohibition_of_discrimination_under_european_human_rights_law_update_2011_en.pdf, accessed March 25th, 2015

Du Bois, F. (2004): “*Rights Trumped? Balancing in Constitutional Adjudication*”, *Acta Juridica*, University of Cape Town

Dworkin, R. (1977): “*Taking Rights Seriously*”, Harvard University Press

Engene, J.O. (2013): “*Mer overvåking, mer kontroll – Noen utviklingstrekk etter 22. juli 2011*”, *Tidsskrift for samfunnsforskning*, No. 2, pp. 234-243

Fredman, S. (2002): “*Discrimination Law*”, Oxford University Press

- Fura, E. & Klamberg, M. (2013): "*The Chilling Effect of Counter-Terrorism Measures: A Comparative Analysis of Electronic Surveillance Laws in Europe and the USA*", in Casadewall, J. (eds), *Freedom of Expression – Essays in Honour of Nicolas Bratza*, Wolf Legal Publishers, Oisterwijk, pp. 463-481
- Galli, F. (2012): "*The War on Terror and Crusading Judges: Re-establishing the Primacy of the Criminal Justice System*" in Masferrer, D.A. (ed), *Post 9/11 and the State of Permanent Legal Emergency*, Springer
- Gerards, J. (2013a): "*How to Improve the Necessity Test of the European Court of Human Rights*", I*CON Oxford University Press and New York University School of Law, Vol. 11, No. 2, pp. 466-490
- Gerards, J. (2013b): "*The Discrimination Grounds of Article 14 of the European Convention on Human Rights*", *Human Rights Law Review*, Vol. 13, No. 1, pp. 99-124
- Greer, S. (2010): "*Anti-Terrorist Laws and the United Kingdom's 'Suspect Muslim Community': A Reply to Pantazis and Pemberton*", *British Journal of Criminology*, Vol. 50, No. 6, pp. 1171-1190
- Greer, S. (2014): "*Reply to Marie Breen-Smyth*", *Critical Studies on Terrorism*, Vol. 7, No. 3, pp. 468-471
- Gross, O. & Ní Aoláin, F. (2001): "*From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*", *Human Rights Quarterly*, Vol. 23, No. 3, pp. 625-649
- Gunn, J.T. (2005): "*Deconstructing Proportionality in Limitations Analysis*", *Emory International Law Review*, Vol. 19
- Harris, D. (2002): "*Profiles in Injustice: Why Racial Profiling Cannot Work*", New Press
- Harris, D., O'Boyle, M., & Warbrick, C., Bates, E. (2009): "*Law of the European Convention on Human Rights*", Oxford University Press
- Henrard, K. (2013): "*The Interrelation Between the Right to Identity of Minorities and their Socio-Economic Participation*", Martinus Nijhoff Publishers
- Hickman, M., Silvestri, S. & Thomas, L. (2010): "*The Construction of 'Suspect' Communities in Britain 1974-2007: Comparing the Impact on Irish and Muslim Communities Interim Report, Preliminary Findings*", London: ISET, available at <https://metranet.londonmet.ac.uk/fms/MRSite/Research/iset/Sus%20Comms/FirstFindings.pdf>, accessed March 2nd, 2015

- Hickman, M., Thomas, L. Silvestri, S., Nickels, H. (2011): “‘Suspect Communities?’ Counter-terrorism Policy, the Press, and the Impact on Irish and Muslim Communities in Britain”, London Metropolitan University, available at http://www.city.ac.uk/_data/assets/pdf_file/0005/96287/suspect-communities-report-july2011.pdf, accessed March 2nd, 2015
- Hillyard, P. (1993): “*Suspect Community: People’s Experience of the Prevention Terrorism Acts in Britain*”, London: Pluto Press with Liberty
- Husabø, E. J. (2012): “*Grenser for kriminalisering av førebuingshandlingar og bruk av skjulte tvangsmidler mot terrorisme i ein demokratisk retsstat*”, Innspill til 22-julikommisjonen, Notat 6/12, available at https://www.regjeringen.no/html/smk/22julikommisjonen/22JULIKOMMISJONEN_NO/CONTENT/DOWNLOAD/214/1692/VERSION/2/FILE/NOTAT_6_HUSAB_GRENSE_FOR_PDF, accessed March 4th, 2015
- Husabø, E.J (2013): “*Counterterrorism and the Expansion of Proactive Police Powers in the Nordic States*”, Journal of Scandinavian Studies in Criminology and Crime Prevention, Vol. 14, No. 1, pp. 3-21
- Hustad, K-E. (2007): «*Straffansvar for terrorisme. En strafferettslig analyse av terrorforsettet, medvirkningsansvaret og avtaleansvaret etter straffeloven § 147 a*», Institutt for offentlig rett, Universitetet i Oslo
- Ignatieff, M. (2004): “*The Lesser Evil: Political Ethics in an Age of Terror*”, Princeton University Press
- Jackson, R. (2007): “*Constructing Enemies: ‘Islamic Terrorism’ in Political and Academic Discourse*”, Government and Opposition, Vol. 42, No. 3, pp. 394-426
- Jacobsen, J.R.T. (2009): “*Fragment til forståing av den rettsstatlege strafferetten*”, Fagbokforlaget
- Janus, E.S. (2004): “*The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence*”, Criminal Law Bulletin, Vol. 40 No. 6
- Joseph, S., Schultz, J., Castan, M. (2004): «*The International Covenant on Civil and Political Rights. Cases, Materials and Commentary*», 2nd edition, Oxford University Press
- Joseph, S. & Castan, M. (2013): «*The International Covenant on Civil and Political Rights. Cases, Materials and Commentary*», 3rd edition, Oxford University Press
- Kant, M. (2005): “*Ausser Spesen nichts gewesen? Eine Bilanz der Rasterfahndung nach dem 11.9.2001*”, Bürgerrechte & Polizei, Vol. 1

Kett-Straub, G. (2006): “*Data Screening of Muslim Sleepers Unconstitutional*”, German Law Journal, Vol. 7, No. 11

Kjærum, M. (2006): “*Protocol No. 12 and the UN Convention on the Elimination of All Forms of Racial Discrimination*” in Non-Discrimination: A Human Right. Seminar Marking the entry into force of Protocol No. 12 to the European Convention on Human Rights”, Council of Europe Publishing

Kundnani, A. (2006): “*Racial profiling and anti-terror stop and search*”, available at www.irr.org.uk/2006/january/ha000025.html, accessed February 13th, 2015

Kundani, A. (2009): «*Spooked: How Not to Prevent Violent Extremism*», London: IRR

Lehto, M. (2009): “*Indirect Responsibility for Terrorist Acts*”, Martinus Nijhoff Publishers

Lochak, D. (1990): «*The notion of discrimination and its place in the conventional international law and in case-law*», Council of Europe: Rights of Persons Deprived of their Liberty, Equality and Non-Discrimination, Kehl am Rhein: N.P Engel

Lomell, H.M. (2006): “*Menneskerettigheter er vel og bra, men for hvem? Offeret eller gjerningsmannen?*”, Nordic Journal of Human Rights, Vol. 1

Lomell, H.M. (2012): “*Punishing the Uncommitted Crime: Prevention, Pre-emption, Precaution and the Transformation of Criminal Law*” in Hudson, B. & Ugelvik, S. (eds), Justice and Security in the 21st Century, Routledge

Lomell, H.M. (2014): «*Forventninger om beskyttelse*», in Fra terror til overvåking. Overvåking i Norge: Et kritisk prospekt, Vidarforlaget

Luban, D. (2005): “*Eight Fallacies About Liberty and Security*”, in Wilson, A.R. (eds) Human Rights in the War on Terror, Cambridge University Press

Lyon, D. (2001): “*Surveillance society: Monitoring everyday life*”, Buckingham, Open University Press

MacNaughton, G. (2009): «*Untangling Equality and Non-discrimination to Promote the Right to Health Care for all*», Health and Human Rights, Vol. 11, No. 2

Mathiesen, T. (2013): “*Towards a Surveillant Society: The Rise of Surveillance Systems in Europe*”, Waterside Press

McHarg, A. (1999): “*Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*”, The Modern Law Review, Vol. 62

- Michaelsen, C. (2006): “*Balancing Civil Liberties against National Security? A Critique of Counterterrorism Rhetoric*”, UNSW Law Journal, Vol. 29, No. 2
- Moeckli, D. (2008): “*Human Rights and Non-discrimination in the ‘War on Terror’*”, Oxford University press
- Moeckli, D. (2010): “*Terrorist Profiling and the Importance of a Proactive Approach to Human Rights Protection*” in *Racial Profiling: A Special BCCLA Report on Racial Profiling in Canada*, B.C. Liberties Association
- Morsink, J. (1999): “*The Universal Declaration of Human Rights: Origins, Drafting and Intent*”, Philadelphia, PA: University of Pennsylvania
- Murphy, M.H. (2013): “*The Relationship between the European Court of Human Rights and National Legislative Bodies: Considering the Merits and the Risks of the Approach of the Court in Surveillance Cases*”, Irish Journal of Legal Studies, Vol. 3, No. 2
- Mythen, G., Walklate, S., Khan, F. (2009): “*I’m a Muslim, but I am not a Terrorist: Victimization, Risky Identities and the Performance of Safety*”, British Journal of Criminology, Vol. 49, pp. 736-754
- Nguyen, T. (2005): “*We are All Suspects Now: Untold Stories from Immigrant Communities after 9/11*”, Boston: Beacon Press
- Nowak, M. (2005): «*UN Covenant on Civil and Political Rights: CCPR Commentary*», 2nd revised edition, N.P. Engel
- O’Connell, R. (2009): “*Cinderella comes to the Ball: Art 14 and the Right to Non-discrimination in the ECHR*”, Legal Studies, Vol. 29, No. 2, pp. 211-229
- Pantazis, C & Pemberton, S. (2009): “*From the ‘Old’ to the ‘New’ Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation*”, British Journal of Criminology, Vol. 49, pp. 646-666
- Pantazis, C & Pemberton, S. (2011): “*Restating the Case for the ‘Suspect Community’*”, British Journal of Criminology, Vol. 51, No. 6, pp. 1054-1062
- Pap, A.L (2012): “*Constitutional Exceptionalism. Efficacy, Proportionality and the Attenuation of Balancing Standards*” in Hudson, B. & Ugelvik, S. (eds), *Justice and Security in the 21st Century*, Routledge
- Pickering, S., McCulloch, Wright-Neville, D. (2008): «*Counter-Terrorism Policing. Community, Cohesion and Security*», Springer

- Pobjoy, J. (2010): *“Treating Like Alike: The Principle of Non-discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection”*, Melbourne University Law Review, Vol. 34
- Posner, E.A. & Vermeule, A. (2007): *“Terror in the Balance: Security, Liberty and the Courts”*, Oxford University Press
- Rawls, J. (1971): *“A Theory of Justice”*, Harvard University Press
- Rosand, E. (2004): *«The Security Council As “Global Legislator”: Ultra Vires or Ultra Innovative?»*, Fordham International Law Journal, Vol. 28:3, pp. 542-590
- Rosen, J. (2004): *«Naked Crowd: Balancing Privacy and Security in an Age of Terror»*, Arizona Law Review, Vol. 46
- Schiek, D. (2007): *“Indirect Discrimination”*, in Schiek, D., Waddington, L., Bell, M, Cases, Materials and Text on National, Supranational and International Non-Discrimination Law, Hart Publishing
- Small, J. (2003): *“Structure and Substance: Developing a Practical and Effective Prohibition on Discrimination under the European Convention on Human Rights”*, International Journal of Discrimination and Law, Vol. 6, pp. 45-68
- Smith, R. (2011): *“The Margin of Appreciation and Human Rights Protection in the ‘War on Terror’: Have the Rules Changed before the European Court of Human Rights?”*, Essex Human Rights Review, Vol. 8, No. 1
- Sollund, R. (2007): *“Tatt for en annen: En feltstudie av relasjonen mellom etniske minoriteter og politiet”*, Oslo: Gyldendal akademisk
- Spalek, B. (2011): *“New Terrorism and Crime Prevention Initiatives Involving Muslim Young People in the UK: Research and Policy Contexts”*, Religion, State and Society, Vol. 39, No. 2-3
- Sælør, M.C. (2010): *“PST: Skjult tjeneste i et åpent samfunn”* in Schartum, D.W. (ed), Overvåking i en rettsstat, Fagbokforlaget
- Tobler, C. (2005): *“Indirect Discrimination: A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law”*, Intersentia
- Tümay, M. (2008): *“The Margin of Appreciation Doctrine developed by the Case Law of the European Court of Human Rights”*, Ankara Law Review, Vol. 5, No. 2, pp. 201-234

Van Brakel, R. & De Hert, P. (2011): “*Policing, Surveillance and Law in a Pre-Crime Society: Understanding the Consequences of Technology Based Strategies*”, Journal of Police Studies, Vol. 20, No. 3, pp. 163-192

Van Dijk, P. & Van Hoof, G.J.H (1998): “*Theory and Practice of the European Convention on Human Rights*”, 3rd edition, Martinus Nijhoff Publishers

Vandenhoe, W. (2005): *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Intersentia

Vermeulen, M. & Bellanova, R. (2012): “*European ‘Smart’ Surveillance: What’s at Stake for Data Protection, Privacy and Non-Discrimination*”, Security and Human Rights, No. 4

Victoroff, J., Adelman, R.J., Matthews, M. (2012): “*Psychological Factors Associated with Support for Suicide Bombing in the Muslim Diaspora*”, Political Psychology, Vol. xx, No. xx

Waldron, J. (2003): “*Security and Liberty: The Image of Balance*”, The Journal of Political Philosophy, Vol. 11, No. 2, pp. 191-210

Waldron, J. (2010): “*Torture, Terror and Trade-Offs. Philosophy for the White House*”, Oxford University Press

Warbrick, C. (2004): “*The European Response to Terrorism in an Age of Human Rights*”, The Journal of International Law, Vol. 15, No. 5

Weigend, T. (2006): “*The Universal Terrorist. The International Community Grappling with a Definition*”, Journal of International Criminal Justice, No. 4, pp. 912-932

Zedner, L. (2005): “*Securing Liberty in the Face of Terror: Reflections from Criminal Justice*”, Journal of Law and Society, Vol. 32, No. 4, pp. 507-533

Zedner, L. (2007): “*Pre-crime and post-criminology?*”, Theoretical Criminology, Vol. 11, No. 2

Web sources:

Løwer, E. (2013): “*Kontrollene med de hemmelige tjenestene – det demokratiske dilemma*”, speech at Oslo Militære Samfund 28 October 2013, available at http://www.oslomilsamfund.no/oms_arkiv/2013/2013-10-28-Løwer.html, accessed January 12th, 2015

NRK 27.09.11: “*Police Security Service: Islamic terror is the greatest threat to Norway*” (PST: Islamistisk terror den største trusselen mot Norge), available at <http://www.nrk.no/norge/mest-redde-for-ekstreme-islamister-1.7810697>, accessed February 25th, 2015

Police Security Service (PST) annual threat assessments [PSTs årlige trusselvurderinger] available at <http://www.pst.no/media/utgivelser/>, accessed January 27th, 2015

Stoltenberg, J. 25.07.11: *Speech held at the City Hall Square in Oslo* [Statsminister Jens Stoltenbergs tale på Rådhusplassen i Oslo], available at <https://www.regjeringen.no/nb/aktuelt/statsminister-jens-stoltenbergs-tale-pa-/id651840/>, accessed February 12th, 2015